

Judicial Review of Final Orders of Removal in the Wake of the REAL ID Act

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Following the Soviet invasion of Afghanistan in 1980, Barbary Hanan, an Afghan citizen, was admitted into the United States.¹ A few years later Hanan was convicted of heroin possession and sentenced to three years imprisonment.² In a hearing before an immigration judge, Hanan requested to remain in the United States on grounds that gross human rights violations occurring in Afghanistan made him potentially eligible for relief under the U.N. Convention Against Torture.³ After an immigration judge denied his request and ordered him deported, Hanan filed an appeal in federal court, claiming that the immigration judge erred in determining that he failed to establish that it is more likely than not that he will be tortured if returned to Afghanistan.⁴ The Eighth Circuit dismissed Hanan's petition for review, stating that Hanan was primarily challenging factual determinations made by an immigration judge that were outside the scope of federal court jurisdiction.⁵

Consider now the case of Selemawit Giday, a citizen of Eritrea who entered the United States in January 2002.⁶ Nine months after arriving in the United States, the government initiated proceedings to remove her from the country on grounds that she was not formerly admitted.⁷ At her removal hearing, Giday requested relief in the form of asylum, alleging that her partial Ethiopian ancestry subjected her to persecution in Eritrea.⁸ An immigration judge rejected her request for asylum on grounds that she failed to demonstrate past persecution or establish a well-founded fear of future persecution should she return to Eritrea.⁹ When Giday filed a petition for

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¹ Hanan v. Gonzales, 449 F.3d 834, 835 (8th Cir. 2006).

² *Id.*

³ *Id.* See *infra* note 45 and accompanying text for an explanation of the U.N. Convention Against Torture.

⁴ *Id.*

⁵ *Id.* at 835–36.

⁶ Giday v. Gonzales, 434 F.3d 543, 546 (7th Cir. 2006).

⁷ *Id.* at 546.

⁸ *Id.*

⁹ *Id.* at 554.

review with the Seventh Circuit, the court not only claimed that it had jurisdiction to hear Giday's appeal, but remanded the case to an immigration judge to consider a more recent version of the U.S. State Department Country Reports detailing political conditions in Eritrea.¹⁰

While such inconsistencies are at odds with the presumption of a uniform immigration policy,¹¹ variations of these situations frequently appear before the 215 immigration courts across the country as well as the federal courts of appeals.¹² Non-citizens who are ordered to be removed from the country may apply for various forms of relief during removal proceedings before an immigration court, such as applying for asylum, withholding of removal due to a fear of persecution if returned to their country, or on grounds that returning them to their country of origin would violate the U.N. Convention Against Torture.¹³ If an immigration court and the Board of Immigration Appeals denies such requests, these individuals are generally entitled to file a petition for review in federal court.¹⁴ As demonstrated by *Giday* and *Hanan*, federal courts have been inconsistent with respect to the types of removal claims over which they claim jurisdiction. A controversy exists over the degree of discretion immigration courts should be afforded in determining whether otherwise deportable aliens can obtain relief from removal.¹⁵ How much discretion should be afforded to immigration courts which are administrative agencies of the executive branch, and how much independent review should be accorded to the federal judiciary? Such questions are germane to the current legal climate.

I. THE CURRENT PROBLEM: TENSIONS BETWEEN IMMIGRATION COURTS AND THE FEDERAL JUDICIARY

In recent years, federal appellate judges have directed severe criticisms at immigration judges (IJs),¹⁶ as a high volume of appeals from immigration

¹⁰ *Id.* at 556. In *Hanan v. Gonzales*, the Eighth Circuit did not consider Hanan's contention that country reports in the years following the immigration judge's decision demonstrated a high probability of torture if he returned to Afghanistan because such reports were not part of the administrative record. 449 F.3d 834, 837 n.3 (8th Cir. 2006).

¹¹ See U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . To establish a uniform Rule of Naturalization").

¹² See *infra* Part IV (discussing specific cases).

¹³ See IRA KURZBAN, IMMIGRATION LAW SOURCEBOOK 253–55, 787 (2006). See also *infra* Part II.

¹⁴ KURZBAN, *supra* note 13, at 259. See also *infra* Part II.B.

¹⁵ See *infra* Part III.

¹⁶ See, e.g., *Cham v. Attorney General*, 445 F.3d 683, 686 (3d Cir. 2006) (criticizing the immigration judge for "bullying" the petitioner "to bits"); *Sukwanputra v. Gonzales*,

courts have flooded circuit courts.¹⁷ Petitions to review decisions of the Board of Immigration Appeals (BIA) currently comprise a significant proportion of the caseload in the courts of appeals.¹⁸ Appellate courts have seen a particular increase in petitions for review from noncitizens seeking relief from final orders of removal.¹⁹ The growing number of immigration appeals is creating a “burden” on the federal appeals courts.²⁰ Additionally, a considerable degree of attention has been directed at immigration courts for a lack of uniformity in immigration decisions.²¹ A study released in July 2006

434 F.3d 627, 637–38 (3d Cir. 2006) (commenting on how the IJ interjected “intemperate and bias-laden remarks,” “none of which had any basis in the facts introduced, or the arguments made, at the hearing”); *Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*, 119 HARV. L. REV. 2596, 2597 (2006) (“The crisis identified by circuit judges is that immigration courts are getting too many decisions wrong. The cases depict a system handicapped by both error and abuse, failing in its responsibility to apply the law.”).

¹⁷ Immigration cases comprised approximately 17% of all federal appeals in 2006, an increase of 3% from 2001. Rachel L. Swarns, *In Bills’ Small Print, Critics See a Threat to Immigration*, N.Y. TIMES, Mar. 25, 2006, at A11. A significant backlog of pending immigration appeals exists, with the largest number of cases in the Ninth and Second Circuits. The backlog has “the potential to impair the quality of justice that appellants deserve, and that the United States is obligated to afford.” *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 91 (2006) (statement of Sen. Patrick Leahy, Member, Senate Comm. on the Judiciary).

¹⁸ See JAMES C. DUFF, U.S. COURTS, 2006 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 115 (2007), available at <http://www.uscourts.gov/judbus2006/contents.html> (documenting that the total number of petitions to review a Board of Immigration Appeals decision rose from 4449 in 2002 to 11,911 in 2006). For a detailed breakdown of the types of decisions made by immigration courts, see EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP’T OF JUSTICE, 2005 STATISTICAL YEAR BOOK (2006), available at <http://www.usdoj.gov/eoir/statspub/fy05syb.pdf>.

¹⁹ See Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 47 (2006–2007) (explaining that during the past ten years there has been a 970% increase in the number of cases seeking judicial review of immigration orders). Immigration cases comprise more than 18% of the federal appellate court civil docket. *Id.* at 47. The majority of BIA appeals filed in the Ninth and Second Circuits involved petitions to review the denial of a request for political asylum. *Id.* at 48.

²⁰ Editorial, *Don’t Tamper With the Courts*, N.Y. TIMES, Apr. 7, 2006, at A24.

²¹ One law professor’s study of immigration judges indicates that, on average, approximately 38% of all asylum petitions are granted. Most judges fall within a range of 25–50%. But some grant 10% of asylum petitions and others grant 80 or 90%. See Margaret Graham Tebo, *Asylum Ordeals; Some Immigrants Are ‘Ground to Bits’ In a System that Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, A.B.A. J., Nov. 2006, at 36, 38–39. Immigration judges vary considerably in their willingness to grant asylum, with denial rates ranging from 10% to

found that even among immigration judges in the same jurisdiction, hearing cases of asylum seekers from the same country, the disparity rate was considerable.²² A number of circuit courts have expressed “frustration” with the handling of asylum cases by IJs and their treatment of immigrants during asylum hearings.²³ In one year alone, the Seventh Circuit remanded 40 percent of the 136 immigration cases it considered, “rejecting rulings of the administrative judges in stern and often scathing language.”²⁴

In response to the growing number of criticisms directed at IJs, in January 2006, former Attorney General Alberto Gonzales proclaimed to embark on a “comprehensive review” of the Immigration Courts and the Board,²⁵ and to institute yearly performance evaluations of IJs, who are Justice Department employees.²⁶ In response to the high volume of immigration cases in federal courts, in May 2006 the Senate passed the Comprehensive Immigration Reform Act.²⁷ One of the more controversial provisions is entitled “Immigration Review Reform,” which requires a GAO study of the appellate process in immigration appeals cases, including the consideration of consolidating all such appeals into one existing circuit court,

more than 98%. From 2000 to 2005, an IJ in Miami rejected 96.7% of asylum petitions, whereas an IJ in NY rejected 9.8% of asylum petitions. *Id.* at 39. The median denial rate was 65%. *Seeking Asylum in the U.S.? Choose Your Judge Carefully*, WASH. POST, Aug. 1, 2006, at A15.

²² *Seeking Asylum in the U.S.?*, *supra* note 21, at A15 (citing Transactional Records Access Clearinghouse (TRAC), New Findings, <http://trac.syr.edu/tracins/latest/current> (last visited Apr. 20, 2008)). See also Nina Bernstein, *New York's Immigration Courts Lurch Under a Growing Burden*, N.Y. TIMES, Oct. 8, 2006, at A39 (discussing how 90% of asylum cases were granted by one immigration judge, whereas only 9% of asylum cases were granted by another judge).

²³ Tebo, *supra* note 21, at 38 (noting that appellate judges have questioned the “skills and temperament” of immigration judges whose asylum cases are increasingly appealed, resulting in a “logjam in the federal circuits”).

²⁴ Noreen S. Ahmed-Ullah & Jon Yates, *Judges Fumble Asylum Cases: Refugee Was Sent Back to Sudan to Face Jail, Beatings*, CHI. TRIB., Sept. 24, 2006, § 1, at 1. See also Maria Arhancet, *Developments in the Judicial Branch: U.S. Attorney General Orders Review of Immigration Courts*, 20 GEO. IMMIGR. L.J. 333, 333 (2006) (explaining that among the allegations against immigration judges are that they have deported aliens who would face persecution and have made inappropriate remarks during immigration proceedings).

²⁵ Press Release, U.S. Dep't of Justice, Attorney General Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html (last visited Apr. 20, 2008). See also Nina Bernstein, *Immigration Judges Facing Yearly Performance Reviews*, N.Y. TIMES, Aug. 10, 2006, at A14.

²⁶ Bernstein, *supra* note 22, at A1.

²⁷ S. 2611, 109th Cong. § 707 (2006).

such as the U.S. Court of Appeals for the Federal Circuit.²⁸ This proposal, which would provide the U.S. Court of Appeals for the Federal Circuit with exclusive jurisdiction to review a final order of removal from immigration courts, has “touched off an outcry” from a number of legal scholars and federal judges.²⁹ Ironically, Congress is attempting to limit alien access to federal courts during a period in which IJs are being criticized for their handling of immigration cases.³⁰

This Note contends that further attempts to limit the scope of judicial review over final orders of removal would have adverse consequences for deportable aliens seeking relief from removal in the form of asylum, withholding of removal due to a clear probability of persecution if returned to their country of origin, or protection under the U.N. Convention Against Torture. While a considerable amount of attention has been directed at immigration courts and individual IJs for a lack of uniformity in rendering decisions,³¹ this Note examines how circuit courts have been similarly inconsistent with respect to the types of removal claims over which they have jurisdiction, by specifically looking at the impact of the REAL ID Act.³² Passed in 2005, the REAL ID Act “reflects a congressional intent to . . . streamline immigration proceedings and to expedite removal while restoring judicial review of constitutional and legal issues.”³³

When the REAL ID was passed, numerous commentators considered the Act’s potential to restrict federal jurisdiction over immigration issues.³⁴ This

²⁸ S. 2611.

²⁹ Swarns, *supra* note 17, at A11. For a detailed criticism of this proposal, see Editorial, *supra* note 20, at A24, which argues that “[j]udges and law professors have been sharply critical of the proposal . . . [because] one of the strengths of the federal judicial system is that cases are heard by judges of general jurisdiction.” Making the Federal Circuit Court the nation’s immigration appeals court may lead to judges being appointed based on their immigration politics. *Id.*

³⁰ See *supra* notes 21–23 and accompanying text.

³¹ See *supra* notes 21–22 and accompanying text.

³² See *infra* Part III.

³³ Grass v. Gonzales, 418 F.3d 876, 879 (8th Cir. 2005).

³⁴ See, e.g., Lenni B. Benson, *Making Paper Dolls: How Restrictions on Judicial Review and the Administrative Process Increase Immigration Cases in the Federal Courts*, 51 N.Y.L. SCH. L. REV. 37, 47 (2006–2007); Daniel Kanstroom, *The Better Part of Valor: The REAL ID Act, Discretion, and the “Rule” of Immigration Law*, 51 N.Y.L. SCH. L. REV. 161 (2006–2007); Aaron G. Leiderman, Note, *Preserving the Constitution’s Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1368 (2006); David M. McConnell, *Judicial Review Under the Immigration and Nationality Act: Habeas Corpus and the Coming of REAL ID (1996–2005)*, 51 N.Y.L. SCH. L. REV. 75 (2006–2007); Sarah A. Moore, Note, *Tearing Down the Fence Around Immigration Law: Examining the Lack of Judicial Review and*

Note builds on this literature by examining the extent to which the REAL ID Act has engendered inconsistent federal circuit court decisions in relief from removal cases.

Part II provides an overview of relief from removal and the role of immigration courts in removal proceedings. Part III provides a historical analysis of judicial review of immigration court decisions and briefly examines the standard of review federal courts have used to evaluate appeals from immigration courts in relief from removal cases. Part IV provides an analysis of the REAL ID Act's impact on judicial review of final orders of removal. Part V concludes by examining alternatives for adjudicating relief from removal cases in a way that achieves judicial economy, while also ensuring procedural fairness in removal hearings.

II. RELIEF FROM REMOVAL

A. *Background on Removal and Relief*

Non-citizens lawfully present in the United States are subject to removal from the country upon order of the Attorney General if they fall within one or more of the statutory classes of deportable aliens under the Immigration and Nationality Act (INA).³⁵ Similarly, an individual who enters the United States illegally or without proper inspection by immigration officials is subject to deportation from the United States.³⁶ Deporting an alien³⁷ carries grave consequences; “[a]lthough not penal in character, deportation statutes as a practical matter may inflict ‘the equivalent of banishment or

the Impact of the REAL ID Act While Calling for a Broader Reading of Questions of Law to Encompass “Extreme Cruelty,” 82 NOTRE DAME L. REV. 2037 (2007); Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459 (2006); Gerald L. Neuman, *The Adequacy of Direct Review After the REAL ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133 (2006–2007).

³⁵ See 8 U.S.C. § 1227(a) (2000). The INA enumerates a number of crimes for which a non-citizen, lawfully present in the United States, can be removed. Included among these are violations of U.S. or foreign law; statutorily listed crimes such as drug offenses, firearm offenses, and domestic violence offenses; and “crimes of moral turpitude.” § 1227(a)(2).

³⁶ 8 U.S.C. § 1182(a)(6) (2000).

³⁷ This Note will use “deportation” and “removal” interchangeably. Prior to 1996, the immigration statutes distinguished between deportation hearings and exclusion hearings. Benson, *supra* note 19, at 41 n.7. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) eliminated the legal distinction between deportation and removal proceedings. *Alaka v. Attorney General*, 456 F.3d 88, 93 n.7 (3d Cir. 2006).

exile'"³⁸ A deportable alien trying to avoid removal may seek several forms of relief, such as voluntary departure, cancellation of removal, adjustment of status, asylum, withholding of removal, and waiver.³⁹ This Note, however, will focus on the forms of relief available to deportable aliens who fear persecution on account of one of five protected categories if returned to their country of origin. These individuals can seek relief from removal in the form of asylum, withholding of removal, or protection under the U.N. Convention Against Torture.

An alien who is physically present in the United States, or who arrives in the United States regardless of whether they are legally or illegally in the country, is permitted to apply for asylum.⁴⁰ The Attorney General and the Secretary of Homeland Security have discretion to grant asylum if an individual satisfies the INA's definition of a "refugee."⁴¹ To qualify for withholding of removal, a non-citizen is required to demonstrate that there is a "clear probability of persecution" if returned to his native country.⁴² While asylum is a discretionary form of relief, for which the standard is a "well-founded fear of persecution,"⁴³ withholding of removal is mandatory for those who can satisfy the higher standard of a "clear probability of persecution."⁴⁴ To gain protection under the U.N. Convention Against

³⁸ *Barber v. Gonzales*, 347 U.S. 637, 642–43 (1954) (quoting *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

³⁹ KURZBAN, *supra* note 13, at 787.

⁴⁰ 8 U.S.C. § 1158(a)(1) (2000).

⁴¹ 8 U.S.C. § 1158(b)(1)(A) (Supp. V 2005). A refugee is one

who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person habitually resided . . . who is unable or unwilling to return to . . . that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion

8 U.S.C. § 1101(a)(42)(A) (2000).

⁴² *INS v. Stevic*, 467 U.S. 407, 413 (1984). *See also* 8 U.S.C. § 1231(b)(3)(A) (2000) ("The Attorney General may not remove an alien . . . if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.").

⁴³ *INS v. Cardoza-Fonesca*, 480 U.S. 421, 423–24 (1987) (quoting 8 U.S.C. § 1101(a)(42) (1982)).

⁴⁴ *Stevic*, 467 U.S. at 409. Another important difference between the two forms of relief is that an alien who has been granted asylum has been temporarily admitted into the United States; whereas an alien who is granted withholding of removal has not been granted legal entry into the United States and may be removed to his country when there is no longer any threat to his life or freedom. H.R. Rep. No. 109-72, at 168 (2005). The

Torture (CAT), an individual must demonstrate that it is “more likely than not that he or she would be tortured if removed to the proposed country of removal.”⁴⁵ A petition for protection under the CAT differs from requests for asylum and withholding of deportation in that the alien “need not demonstrate that he will be tortured on account of a particular belief or immutable characteristic,” but rather he must establish a likelihood of being subjected to torturous acts inflicted by a public official.⁴⁶

The Department of Justice has found that “[i]n most removal proceedings, aliens concede that they are removable, but then apply for one or more forms of relief from removal.”⁴⁷ Many of the non-citizens applying for relief are deported because they have overstayed visas,⁴⁸ are in the United States illegally,⁴⁹ or have been convicted of a crime.⁵⁰ Since relief from removal permits otherwise deportable aliens to remain in the United States, efforts to expand judicial review over final orders of removal issued by immigration courts are contentious. While relief from removal is sometimes

degree of persecution necessary to obtain relief from removal is an “extreme concept” requiring “more than a few isolated incidents of verbal harassment or intimidation . . . [m]ere harassment is not persecution.” *Sepulveda v. Attorney General*, 401 F.3d 1226, 1231 (11th Cir. 2005) (quoting *Gonzales v. Reno*, 212 F.3d 1338, 1355 (11th Cir. 2000)).

⁴⁵ 8 C.F.R. § 208.16(c)(2) (2007). The Convention Against Torture (CAT) provides that “[n]o State Party shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 3, para. 1, Dec. 10, 1984, 1465 U.N.I.S. 85. On April 18, 1988, the United States became a party to CAT. 136 CONG. REC. 36, 192–99 (1990).

⁴⁶ *Amanfi v. Ashcroft*, 328 F.3d 719, 725 (3d Cir. 2003).

⁴⁷ U.S. DEP’T OF JUSTICE, FACT SHEET: IMMIGRATION COURT PROCESS IN THE UNITED STATES: REMOVAL PROCEEDINGS, BOND REDETERMINATIONS, ASYLUM, CONVENTION AGAINST TORTURE 2 (Apr. 28, 2005), <http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.pdf> (last visited Apr. 20, 2008).

⁴⁸ See, e.g., *Boctor v. Gonzales*, 474 F.3d 488, 489–91 (7th Cir. 2007) (petitioning for asylum, withholding of removal, and relief under CAT based on an alleged fear of religious persecution if returned to Egypt).

⁴⁹ See, e.g., *Zhang v. Gonzales*, 434 F.3d 993, 994 (7th Cir. 2006) (seeking political asylum and withholding of deportation to China after entering the United States without a valid passport or visa).

⁵⁰ See, e.g., *Kamara v. Attorney Gen.*, 420 F.3d 202, 206 (3d Cir. 2005) (applying for asylum, withholding of removal, and protection under CAT after a conviction for selling cocaine); William K. Rashbaum, *3 Relatives of Plotter Are Held by Officials*, N.Y. TIMES, Jan. 10, 2007, at B1 (seeking relief from removal by applying for status as an asylee on grounds that he fears religious persecution if returned to Pakistan, after conviction for conspiring to place an explosive device in Herald Square subway station in 2004 and a final order of deportation was filed against him).

regarded as a potential for abuse, where non-citizens who otherwise would be deported can fabricate stories of persecution in their native country,⁵¹ it is also acknowledged that “[r]emoval visits a great hardship on the individual and deprives him [or her] of the right to stay and live and work . . .” in this country.⁵² Before discussing the difficulties appellate courts face in adjudicating relief from removal cases, it is necessary to provide a brief discussion of the role of immigration courts in removal proceedings.

B. The Process of Obtaining Relief from Removal: The Role of the Immigration Court

Removal proceedings are initiated by the Department of Homeland Security and are adjudicated by IJs.⁵³ IJs, who currently handle 300,000 cases each year,⁵⁴ are administrative judges within the Executive Office for Immigration Review and are appointed by the Attorney General.⁵⁵ Once an IJ renders a decision, the non-citizen or the Department of Homeland Security may appeal to the BIA.⁵⁶ The BIA has appellate jurisdiction to review final decisions of IJs in removal cases.⁵⁷ Since immigration courts are

⁵¹ See, e.g., Press Release, U.S. House of Representatives Comm. on the Judiciary, Sensenbrenner Praises REAL ID Act's Inclusion in Supplemental Conference Report 1 (May 4, 2005), <http://judiciary.house.gov/media/pdfs/REALIDconfagree42905.pdf> (last visited Apr. 20, 2008) (commenting on how the REAL ID Act of 2005 will “weed out fraudulent asylum applications made by people lying through their teeth”); Press Release, Rep. Orrin Hatch, Congressional Republicans Unveil Immigration Reform Legislation (May 19, 2004) (on file with author) (commenting that a proposed bill to consolidate all immigration appeals to one federal circuit will target aliens “who intend to prolong their stay by filing frivolous petitions”).

⁵² *Kaweesa v. Gonzales*, 450 F.3d 62, 69 (1st Cir. 2006).

⁵³ See U.S. Dep't of Justice, Fact Sheet: Immigration Court Process in the United States 1 (Apr. 28, 2005), <http://www.usdoj.gov/eoir/press/05/ImmigrationCourtProcess2005.pdf> (last visited Apr. 20, 2008). Removal proceedings are generally the most frequent form of proceedings before the Executive Office for Immigration Review (EOIR). *Id.*

⁵⁴ Bernstein, *supra* note 25.

⁵⁵ 8 U.S.C. § 1101(b)(4) (2000). An immigration judge, who is under the supervision of the Attorney General, performs duties prescribed by the Attorney General. *Id.* “Subject to any specific limitation prescribed by the Act and this chapter, immigration judges shall also exercise the discretion and authority conferred upon the Attorney General . . . as is appropriate and necessary for the disposition of such cases.” 8 C.F.R. § 1240.31 (2007).

⁵⁶ See 8 C.F.R. § 1003.1(b) (2007).

⁵⁷ 8 C.F.R. § 1003.1(b)(3). Like Immigration Courts, the BIA is part of the Department of Justice, subject to the general supervision of the Executive Office for

not Article III courts, but rather agencies under the authority of the Attorney General,⁵⁸ “[i]mmigration hearings qualitatively differ from the typical American model of civil adjudication which is so heavily dependent on liberal pre-trial discovery of evidence.”⁵⁹ Unlike an Article III judge, an IJ is not only a fact-finder and adjudicator, but also has an affirmative obligation to establish and develop the record in the course of withholding of deportation and asylum proceedings.⁶⁰ The BIA is also expected to ensure uniformity of decision making⁶¹ by providing a standardized interpretation of the Immigration and Nationality Act for IJs to follow.⁶²

Despite providing clear guidelines for IJs to follow, immigration court decisions are increasingly appealed to the BIA, which are then increasingly appealed in federal courts.⁶³ Some attribute this to the administrative review process rather than to individual IJs.⁶⁴ It has also been argued that

Immigration Review (EOIR) of the DOJ, and its attorneys are appointed by the Attorney General. § 1003.1(a)(1). The BIA reviews facts determined by the IJ, such as the credibility of testimony, under a “clearly erroneous” standard, 8 C.F.R. § 1003.1(d)(3)(i) (2004), and will not engage in a *de novo* review of findings of fact made by an IJ, *In re S-H-*, 23 I. & N. Dec. 462, 464–66 (B.I.A. 2002).

⁵⁸ Jonathan L. Hafetz, *The Untold Story of Noncriminal Habeas Corpus and the 1996 Immigration Acts*, 107 YALE L.J. 2509, 2537 (1998).

⁵⁹ *Ni v. Attorney General*, 210 F. App’x 161, 165 (3d Cir. 2006).

⁶⁰ *Boci v. Gonzales* 473 F.3d 762, 768 (7th Cir. 2007). *See also* 8 U.S.C. § 1229a(b)(1) (2000) (“[An IJ shall] receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses.”).

⁶¹ Jeffrey L. Romig, *Administrative Review of Cases Involving the Exercise of Discretion Under Section 212(c): Should the Board of Immigration Appeals Adopt an “Abuse of Discretion” Standard?*, 9 GEO. IMMIGR. L.J. 63, 70 (1995). Applicants should expect that a request is given “uniform consideration regardless of whether they appeared initially in Miami or Anchorage, Boston or San Diego.” *Id.*

⁶² Evelyn Cruz, *Double the Injustice, Twice the Harm: The Impact of the Board of Immigration Appeals’s Summary Affirmance Procedures*, 16 STAN. L. & POL’Y REV. 481, 499–500 (2005). (“In recent years, BIA decisions have become more meaningful as Congress has sought to limit the availability of circuit court appellate review.”).

⁶³ *See* John R.B. Palmer et al., *Why Are So Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005) (explaining that during the 1990s the BIA “accumulated a lengthy backlog of cases”). In March 2002, the BIA had a backlog of over 56,000 cases. *Id.* This led to appellate courts receiving roughly five times as many petitions for review as they did prior to 2002. *Id.* at 3–4.

⁶⁴ *See* Susan Compennolle et al., Op-Ed., *Judging Immigration Court Decisions*, CHI. TRIB., Oct. 13, 2006, at 30 (explaining that individual IJs are not to blame for poor decisions). Immigration attorneys contend that the DOJ’s system for handling immigration court cases is equally problematic; immigration judges are assigned more cases than they are equipped to handle. *Id.*

congressional efforts to limit federal court review over immigration court decisions has ironically had the effect of increasing the number of petitions filed in federal courts.⁶⁵ However, before providing an analysis of the current controversy, it is necessary to provide a brief historical overview of judicial review of immigration court decisions.

III. JUDICIAL REVIEW OF FINAL ORDERS OF DEPORTATION

It has been noted that immigration policy and judicial review have the markers of “a kind of oil-and-water relationship.”⁶⁶ Under the plenary immigration power doctrine, a judicially created doctrine, “the judicial branch must defer to executive and legislative branch decision-making”⁶⁷ in

⁶⁵ Benson, *supra* note 19, at 72. See also *Immigration Litigation Reduction*, *supra* note 17 (explaining that reforms directed at the BIA to reduce the backlog of cases such as using fewer judges to review individual cases, thus affording petitioners even less meaningful review, have resulted in increasing the number of immigration appeals in federal courts).

⁶⁶ Stephen H. Legomsky, *Fear and Loathing in Congress and the Courts: Immigration and Judicial Review*, 78 TEX. L. REV. 1615, 1615 (2000).

⁶⁷ *Zadvydas v. Davis*, 533 U.S. 678, 695 (2001). The plenary power doctrine has its origins in *Chae Chan Ping v. United States* where the Supreme Court upheld a congressional act prohibiting Chinese laborers from entering the United States. 130 U.S. 581, 589–90, 610–11 (1889). Under the logic of *Chae Chan Ping*, Congress could exclude aliens from admission to the country on the basis of race, under the pretense of its “plenary power.” See VICTOR ROMERO, *ALIENATED: IMMIGRATION RIGHTS, THE CONSTITUTION, AND EQUALITY IN AMERICA* 163 (2005). Since then the Court has consistently deferred to Congress with respect to immigration policy. See, e.g., *Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (noting “the limited scope of judicial inquiry into immigration legislation” authority to regulate aliens is “of a political character and therefore subject only to narrow judicial review”); *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (holding that the First Amendment imposed no barrier on the Attorney General’s decision to deny a temporary nonimmigrant visa to a Belgian journalist who espoused Marxist views); *Galvan v. Press*, 347 U.S. 522, 531–32 (1954) (upholding the constitutionality of the Internal Security Act of 1950 which permitted deporting aliens who were members of the Communist Party). See also Gerald Neuman, *Discretionary Deportation*, 20 GEO. IMMIGR. L.J. 611, 618–19 (2006). Neuman found that:

In the late nineteenth century, the Supreme Court derived from international law a constitutional conception of Congress’s absolute substantive power to deny aliens entry to the United States or to expel them from its territory, unconstrained by any judicially enforceable constitutional limits. . . . [T]he Bill of Rights placed no judicially enforceable barrier to congressional adoption of immigration policies that separated husbands from wives, or parents from children, penalized unpopular views, or discriminated by race.

matters related to immigration. The authority to remove non-citizens from the United States is considered “essentially a power of the political branches of government, the legislative, and executive, [a power that] may be exercised entirely through executive officers, ‘with such opportunity for judicial review of their action as Congress may see fit to authorize or permit.’”⁶⁸ The granting of asylum is considered discretionary,⁶⁹ and no judicial review of deportation orders is guaranteed by the Constitution.⁷⁰ At the same time, non-citizens placed in deportation proceedings are afforded “quasi” constitutional protections. While non-citizens are entitled to procedural due process during removal proceedings,⁷¹ a removal proceeding is viewed as distinct from a criminal proceeding,⁷² and as such, unlike in criminal proceedings, non-citizens have no right to counsel during deportation proceedings.⁷³ Nonetheless, it has been noted that there is a “strong presumption in favor of judicial review of administrative action.”⁷⁴

Part III.A will provide a brief historical explanation of the relationship between judicial review and immigration court decisions. Part III.B will discuss one development in particular, the *INS v. St. Cyr* case. Part III.C will then examine the standard of review federal courts have used to evaluate decisions made by immigration courts in relief from removal cases. Part III.D will discuss credibility determinations, an important element of relief from removal cases.

⁶⁸ *Carlson v. Landon*, 342 U.S. 524, 532–33 (1952) (citation omitted).

⁶⁹ See *supra* note 41 and accompanying text.

⁷⁰ *Carlson*, 342 U.S. at 537.

⁷¹ See *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001) (“[T]he Due Process Clause [of the Fifth Amendment] applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”). The Fifth Amendment entitles aliens to due process of law in deportation proceedings. *Demore v. Kim*, 538 U.S. 510, 523 (2003). Due process requires that a court afford an applicant a meaningful opportunity to be heard and a reasonable opportunity to present evidence on her behalf. *Rodriguez Galicia v. Gonzales*, 422 F.3d 529, 538 (7th Cir. 2005). However, an alien does not have a constitutional right to discretionary relief from removal. *United States v. Lopez-Ortiz*, 313 F.3d 225, 231 (5th Cir. 2002). While an alien may raise a constitutional or legal claim arising from the refusal of an agency to consider him for discretionary relief, he may not challenge the agency’s decision to exercise or not exercise its discretion to grant relief. *Saint Fort v. Ashcroft*, 329 F.3d 191, 203 (1st Cir. 2003).

⁷² *Ballesteros v. Ashcroft*, 452 F.3d 1153, 1160 (10th Cir. 2006).

⁷³ See Karin Brullard, *Battling Deportation Often a Solitary Journey*, WASH. POST, Jan. 8, 2007, at A1 (noting that a growing number of aliens appearing before immigration courts have no legal counsel).

⁷⁴ *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (citation omitted).

A. A Historical Overview of Judicial Review of Immigration Court Decisions

Congress first provided for “suspension of deportation” in 1940 by adding such a provision to the Immigration Act of 1917.⁷⁵ “Suspension of deportation” was not a right afforded to deportable aliens, but was dispensed according to the “unfettered discretion of the Attorney General.”⁷⁶ Despite the discretionary nature of deportation, a non-citizen who wished to challenge a final order of removal could file a habeas corpus petition in a federal district court.⁷⁷ Thus, even in the absence of specific statutory provisions providing for judicial review of final orders of removal, federal courts assumed jurisdiction in immigration cases “because of the simple fact that physical restraint was inherently involved in the removal of an unwilling noncitizen.”⁷⁸ The Supreme Court, however, has noted that the terms “judicial review” and “habeas corpus” have historically distinct meanings.⁷⁹

⁷⁵ Act of July 1, 1948, ch. 783, 62 Stat. 1206 (codified as amended at 8 U.S.C. § 155(c) (Supp. V 1946)). See also *Jay v. Boyd*, 351 U.S. 345, 356 n.15 (1956). The provision provided that the Attorney General may suspend deportation under certain circumstances. *Id.*

⁷⁶ *Jay*, 351 U.S. at 354. The suspension of deportation was regarded as “an act of grace” by the Attorney General. *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1982). See also *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950) (quoting Judge Learned Hand) (“The power of the Attorney General to suspend deportation is a dispensing power, like a judge’s power to suspend the execution of a sentence, or the President’s to pardon a convict.”). See also S. REP. NO. 82-1137, at 3 (1952) (stating that this grant of suspension is entirely discretionary).

⁷⁷ *INS v. St. Cyr*, 533 U.S. 289, 305–06 (2001). Prior to the enactment of the 1952 Immigration and Nationality Act, the exclusive means available to non-citizens who wished to challenge a final order of deportation was by filing a writ of habeas corpus. *Id.* at 306. The writ of habeas corpus was “a means of reviewing the legality of Executive detention.” *Id.* at 301. Cf. Gerald L. Neuman, *Federal Courts Issues in Immigration Law*, 78 TEX. L. REV. 1661, 1664 (2000) (“The physical custody inherent in the deportation process triggers the applicability of the Suspension Clause, despite the fact that the individuals detained are aliens, and despite the fact that the detention occurs as part of the regulation of immigration.”).

⁷⁸ Hiroshi Motomura, *Immigration Law and Federal Court Jurisdiction Through the Lens of Habeas Corpus*, 91 CORNELL L. REV. 459, 461 (2006); see also *Heikkila v. Barber*, 345 U.S. 229, 231–33 (1953) (stating that, while the 1917 Immigration Act stated that the Attorney General’s decision to deport an alien is final, the Attorney General’s discretion “d[id] not settle the question” of whether judicial review was precluded); *Rubinstein v. Brownell*, 206 F.2d 449, 452–53 (D.C. Cir. 1953) (citing *Heikkila*, 345 U.S. at 233) (explaining that, while the 1952 Immigration and Nationality Act states that “[i]n any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General

Despite efforts on the part of federal courts to provide judicial review of final orders of removal, Congress has consistently attempted to restrict access to federal courts for deportable aliens. In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which barred review of deportation orders of non-citizens who had certain criminal convictions.⁸⁰ AEDPA also eliminated review of most discretionary determinations related to relief from removal.⁸¹ Shortly after AEDPA was passed, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which placed certain determinations made by immigration courts beyond the scope of judicial review.⁸² While both AEDPA and IIRIRA contained provisions eliminating habeas review of deportation and removal orders issued against criminal aliens,⁸³ federal courts retained jurisdiction under 28 U.S.C. § 2241 over habeas corpus petitions brought by aliens in custody pursuant to a deportation order.⁸⁴

shall be final," the word "final" does not necessarily exclude judicial review of an administrative decision).

⁷⁹ *St. Cyr*, 533 U.S. at 311; see also *Heikkila*, 345 U.S. at 236 ("[I]t is the scope of inquiry on habeas corpus that differentiates [habeas review from] judicial review . . ."). In *Heikkila*, even though the Court determined that the 1917 Immigration Act barred an alien from directly attacking a deportation order, the Court affirmed the right to habeas corpus. *Id.* at 236-37. Appellate courts have also drawn this distinction. See, e.g., *Saint Fort v. Ashcroft*, 329 F.3d 191, 203 (1st Cir. 2003) (finding that the scope of habeas review is not the same as the scope of statutory judicial review in the courts of appeals).

⁸⁰ Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996). The Act precluded all judicial review of final removal orders of aliens deported for committing certain types of crimes, such as an "aggravated felony." *Id.* § 440(a) (codified at 8 U.S.C. § 1105a(a)(10) (2000)).

⁸¹ *Id.* § 440(d) (codified at 8 U.S.C. § 1182 (2000)) (restricting discretionary relief for aliens removable for having committed aggravated felonies and drug-related crimes).

⁸² Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009-549 (1996) (codified at 8 U.S.C. § 1252 (2000)). IIRIRA provides that no court shall have jurisdiction to hear any cause or claim by or on behalf of an alien arising from a decision or action of the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien. *Reno v. Am.-Arab Anti-Discrimination Comm.*, 525 U.S. 471, 476 (1999). For a further discussion of the impact of AEDPA and IIRIRA on judicial review of deportation orders, see Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1975-78 (2000).

⁸³ See H.R. REP. NO. 109-72, at 172-73 (2005).

⁸⁴ See, e.g., *Dunbar v. INS*, 64 F. Supp. 2d 47, 50-51 (D. Conn. 1999) (holding that, even in light of the jurisdiction-stripping provisions of AEDPA and IIRIRA, Congress did not expressly limit federal judicial petitions for writs of habeas corpus). The district courts have jurisdiction under 28 U.S.C. § 2241 (2000) to review the Attorney General's decision denying an alien discretionary relief. *Id.*

B. *The Significance of INS v. St. Cyr*

INS v. St. Cyr is regarded as a major development in the history of judicial review of immigration decisions.⁸⁵ AEDPA and IIRIRA had both contained provisions eliminating habeas review of deportation orders issued against criminal aliens.⁸⁶ In *INS v. St. Cyr*, the Supreme Court held that neither AEDPA nor IIRIRA denied federal courts jurisdiction over habeas corpus petitions under 28 U.S.C. § 2241 brought by criminal aliens who were in custody under a deportation order.⁸⁷ Following the *St. Cyr* decision, non-citizens who were guilty of a deportable criminal offense were permitted to seek review of their removal orders in district court and then appeal to the circuit courts of appeals, whereas non-criminal aliens were able to generally seek review only in the courts of appeals.⁸⁸ Congress thus became concerned that non-citizens who “committed serious crimes in the United States [were] able to obtain more judicial review than non-criminal aliens.”⁸⁹

The REAL ID Act of 2005 was enacted in part to “cure the anomalies” created by *St. Cyr* and its progeny by depriving criminal aliens of the opportunity to bring petitions pursuant to 28 U.S.C. § 2241, but permitting a circuit court to review “those issues that were historically reviewable on habeas.”⁹⁰ Passed in 2005, the REAL ID Act stripped district courts of jurisdiction to hear any final orders of removal and placed review of all final removal orders for both criminal and non-criminal aliens in the courts of appeals.⁹¹ By placing judicial review of deportation orders in the courts of

⁸⁵ See, e.g., *Ramadan v. Gonzales*, 479 F.3d 646, 651 (9th Cir. 2007) (“In *INS v. St. Cyr*, the Supreme Court determined the scope of judicial review in a post-AEDPA/IIRIRA regime in light of the requirements of the Suspension Clause of the Constitution.”); *Motomura*, *supra* note 78, at 466 (explaining that *INS v. St. Cyr* addressed the question of the standard of review in immigration habeas cases).

⁸⁶ See AEDPA § 440; IIRIRA § 242(2)(C).

⁸⁷ 533 U.S. 289, 314 (2001).

⁸⁸ *Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 153 n.5 (2d Cir. 2006). Prior to the REAL ID Act, the courts of appeals were divided over whether the district courts possessed habeas jurisdiction to consider constitutional challenges to deportation orders brought by non-criminal aliens. *Ishak v. Gonzales*, 422 F.3d 22, 27 (1st Cir. 2005).

⁸⁹ H.R. REP. NO. 109-72, at 174 (2005).

⁹⁰ *Id.* at 174–75.

⁹¹ REAL ID Act of 2005, Pub. L. No. 109-13, § 106(a)(5), 119 Stat. 302, 316 (codified at 8 U.S.C. § 1252). The REAL ID Act provides that

[n]otwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28 . . . a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal For purposes of this Act, in every

appeals, Congress sought to streamline what it referred to as “bifurcated and piecemeal” review of orders of removal.⁹² The REAL ID Act eliminated habeas jurisdiction over final orders of deportation, providing instead for petitions for review under 8 U.S.C. § 1252, which circuit courts alone can consider.⁹³

The Supreme Court has held that if habeas is eliminated, Congress must offer “a collateral remedy which is neither inadequate nor ineffective” to challenge the legality of a person’s detention.⁹⁴ Congress was aware of this when it passed the REAL ID Act, and as it noted during the congressional debates, under the holding of *INS v. St. Cyr*, there is no Suspension Clause violation if Congress provides an adequate alternative to habeas corpus for judicial review.⁹⁵ One of the more contentious issues that has arisen since the passage of the REAL ID Act is whether providing circuit courts with exclusive jurisdiction over constitutional claims and questions of law raised in petitions for review of final orders of removal is an “adequate alternative,” or whether it violates the Suspension Clause.⁹⁶ The question of whether appellate courts are an adequate substitute for habeas is particularly relevant in the context of claims for asylum, withholding of removal, and CAT

provision that limits or eliminates judicial review or jurisdiction to review, the terms ‘judicial review’ and ‘jurisdiction to review’ include habeas corpus review pursuant to section 2241 of title 28 . . . or any other habeas corpus provision

Id.

⁹² H.R. REP. NO. 109-72, at 173–75 (2005).

⁹³ *Gittens v. Menifee*, 428 F.3d 382, 383 (2d Cir. 2005). *See also Ishak*, 422 F.3d at 29 (noting that the REAL ID Act “definitively eliminated any provision for jurisdiction” in the district courts over habeas petitions challenging final orders of removal); *Gelaneh v. Ashcroft*, 153 F. App’x 881, 885 (3d Cir. 2005) (“[The REAL ID Act] expressly eliminated district courts’ habeas jurisdiction over removal orders.” (citation omitted)).

⁹⁴ *Swain v. Pressley*, 430 U.S. 372, 381 (1977). *Cf.* U.S. CONST. art. I, § 9, cl. 2 (“The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”).

⁹⁵ 151 CONG. REC. H2813, H2873 (daily ed. May 3, 2005). When the REAL ID Act was passed it was noted that “[n]o alien, not even criminal aliens, will be deprived of judicial review of such claims. Unlike AEDPA and IIRIRA, which attempted to eliminate judicial review of criminal aliens’ removal orders, section 106 would give every alien one day in the court of appeals, satisfying constitutional concerns.” H.R. REP. NO. 109-72, at 174–75. According to the House Report, the REAL ID Act would provide every alien with a fair opportunity to obtain judicial review. *Id.*

⁹⁶ *See, e.g., Wahab v. Attorney General*, 373 F. Supp. 2d 524, 526 n.3 (E.D. Pa. 2005) (suggesting that vesting exclusive jurisdiction in circuit courts amounts to a “wholesale elimination” of the writ for aliens contesting a removal order). *Cf. Okeezie v. Chertoff*, 430 F. Supp. 2d 655, 658–59 (W.D. Tex. 2006) (stating that the REAL ID Act is Congress’s attempt to provide a constitutionally adequate alternative to habeas review).

protection, where appellate courts, unlike district courts, are barred from engaging in further fact finding, and the outcome of the case often depends on the ability of a petitioner to satisfy a heavy evidentiary burden.⁹⁷

C. *Standard of Judicial Review: The Substantial Evidence Test*

This section will briefly discuss the standard of review used by federal courts to evaluate challenges to a BIA final order of removal in the context of claims for asylum, withholding of removal, and protection under CAT. It will highlight some of the tensions regarding discretionary judgments committed to executive agencies and judicial review.

As an agency of the Executive Branch, the BIA, according to the Supreme Court, should be accorded *Chevron*-like deference as it gives ambiguous statutory terms “concrete meaning through a process of case-by-case adjudication.”⁹⁸ In *INS v. Aguirre-Aguirre* the Supreme Court held that judicial deference to the Executive Branch is particularly important in the immigration context where “officials ‘exercise especially sensitive political functions that implicate questions of foreign relations.’”⁹⁹ Thus, recent Supreme Court decisions have directed circuit courts to accord more deference to BIA decisions in removal proceedings.¹⁰⁰

Factual determinations made by an Immigration Court and the BIA are generally reviewed by appellate courts under the “highly deferential substantial evidence test,” which requires a circuit court to “view the record . . . in the light most favorable to the [IJ]’s decision and draw all reasonable inferences in favor of that decision.”¹⁰¹ Factual determinations that are subject to the substantial evidence test include a determination of whether a

⁹⁷ See *infra* Part III.A.

⁹⁸ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (citation omitted).

⁹⁹ *Id.* (citing *INS v. Abudu*, 485 U.S. 94, 110 (1988)).

¹⁰⁰ John W. Guendelsberger, *Judicial Deference to Agency Decisions in Removal Proceedings in Light of INS v. Ventura*, 18 GEO. IMMIGR. L.J. 605, 606 (2004) (citing *INS v. Ventura*, 537 U.S. 12 (2002); *INS v. Aguirre-Aguirre* 526 U.S. 415 (1999); *INS v. Yang*, 519 U.S. 26 (1996); and *INS v. Elias-Zacarias*, 502 U.S. 478 (1992)).

¹⁰¹ *Adefemi v. Ashcroft*, 386 F.3d 1022, 1026–27 (11th Cir. 2004). The substantial evidence standard has its origins in the Administrative Procedure Act, which provides that a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . (E) unsupported by substantial evidence in a case . . . reviewed on the record of an agency hearing provided by statute.” 5 U.S.C. § 706(2)(E) (2000). The “substantial evidence test” was also articulated by the Supreme Court in *INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992).

petitioner has suffered past persecution, or is likely to suffer future persecution,¹⁰² and the credibility of the applicant.¹⁰³

While immigration courts determine whether a deportable alien has established a likelihood of persecution or torture upon return to their country of origin, so as to qualify for withholding of removal, a circuit court is permitted to reverse an immigration court's decision if "the evidence . . . presented was so compelling that no reasonable factfinder could fail to find the requisite fear of persecution."¹⁰⁴ The substantial evidence standard requires an appellate court to uphold the findings of the BIA "as long as they are 'supported by reasonable, substantial, and probative evidence on the record considered as a whole.'"¹⁰⁵ A number of circuits have followed this substantial evidence standard.¹⁰⁶

D. Credibility Determinations

Even in the absence of corroboration of past or future persecution, it has generally been held that the testimony of an applicant is sufficient where the testimony "is believable, consistent, and sufficiently detailed to provide a

¹⁰² Gao v. Ashcroft, 299 F.3d 266, 272 (3d Cir. 2002).

¹⁰³ Yu v. Ashcroft, 364 F.3d 700, 703 (6th Cir. 2004).

¹⁰⁴ Nakimbugwe v. Gonzales, 475 F.3d 281, 285 (5th Cir. 2007) (citing *Elias-Zacarias*, 502 U.S. at 483–84); see also 8 U.S.C. § 1252(b)(4)(B) (2000) ("[A]dministrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary."); Pavlyk v. Gonzales, 469 F.3d 1082, 1087 (7th Cir. 2006); Saah v. Gonzales, 201 F. App'x 354, 357 (6th Cir. 2006) (citation omitted) ("[A reviewing] court must uphold the BIA's decision unless it is 'manifestly contrary to the law.'"); Adefemi v. Ashcroft, 386 F.3d 1022, 1027 (11th Cir. 2004) (en banc), cert. denied 544 U.S. 1035 (2005) ("[T]he mere fact that the record may support a contrary conclusion is not enough to justify a reversal of the administrative findings.").

¹⁰⁵ Sanusi v. Gonzales, 474 F.3d 341, 345 (6th Cir. 2007) (citation omitted).

¹⁰⁶ See, e.g., Sarr v. Gonzales, 474 F.3d 783, 788–89 (10th Cir. 2007); Nicolas v. Attorney Gen., 179 F. App'x 641, 643 (11th Cir. 2006); Chen v. Gonzales, 434 F.3d 212, 216 (3d Cir. 2005); Blanco de Belbruno v. Ashcroft, 362 F.3d 272, 278 (4th Cir. 2004); Nyama v. Ashcroft, 357 F.3d 812, 815 (8th Cir. 2004). Congress codified the substantial evidence test as part of IIRIRA, "providing that for judicial review of BIA determinations, 'administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary.'" Michael M. Hethmon, *Tsunami Watch on the Coast of Bohemia: The BIA Streamlining Reforms and Judicial Review of Expulsion Orders*, 55 CATH. U. L. REV. 999, 1040 (2006) (citation omitted). IIRIRA "expressly stripped the Article III courts of authority to consider additional evidence, even material evidence. *Elias-Zacarias* remains the standard of review used by the federal courts to define the scope of their review of fact-finding by DHS officials, IJs, and the BIA." *Id.*

plausible and coherent account of the basis [for his] fear.”¹⁰⁷ Given the difficulty in verifying an applicant’s testimony, an IJ is expected to make “a reasoned and thorough credibility determination.”¹⁰⁸ A credibility analysis evaluates an applicant’s claim for internal consistency, level of detail, and plausibility.¹⁰⁹ An IJ may make an adverse credibility determination based on inconsistent statements, conflicting evidence, and “inherently improbable testimony” in light of the background evidence on country conditions.¹¹⁰ Since credibility decisions are considered factual findings made by immigration courts, they are generally reviewed by appellate courts under a substantial evidence standard.¹¹¹ While an adverse credibility finding made by an IJ is accorded substantial deference, the finding “must be supported by specific reasons,” and “[a]ny inconsistencies in an applicant’s representations must ‘go to the heart of the applicant’s claim’ If discrepancies cannot be viewed as attempts by the applicant to enhance his claims of persecution, they have no bearing on credibility.”¹¹²

Appellate courts have generally circumscribed their scope of review over an IJ’s adverse credibility findings in the context of asylum and withholding of removal claims because these determinations “require intensive factual inquiries that appellate courts are ill-suited to conduct.”¹¹³ However, it is precisely in the area of credibility determinations that appellate courts have directed some of their harshest criticisms at IJs.¹¹⁴

¹⁰⁷ *In re S-M-J*, 21 I. & N. Dec. 722, 724 (BIA 1997). See also 8 C.F.R. § 208.13(a) (2006) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”). For an application of this standard, see *In re Dass*, 20 I. & N. Dec. 120 (BIA 1989) and *Gjerazi v. Gonzales*, 435 F.3d 800 (7th Cir. 2006).

¹⁰⁸ *Gjerazi*, 435 F.3d at 808.

¹⁰⁹ *Id.*

¹¹⁰ *In re S-M-J*, 21 I. & N. Dec. at 729.

¹¹¹ *Bah v. Gonzales*, 462 F.3d 637, 640 (6th Cir. 2006).

¹¹² *Saah v. Gonzales*, 201 F. App’x 354, 359 (6th Cir. 2006) (citation omitted); accord *Castañeda-Castillo v. Gonzales*, 464 F.3d 112, 122 (1st Cir. 2006); *Secaida-Rosales v. INS*, 331 F.3d 297, 307 (2d Cir. 2003). However, the REAL ID Act altered the degree of deference accorded to immigration judges in making credibility assessments. See *infra* Part III.C.

¹¹³ *Xiao Ji Chen v. U.S. Dep’t of Justice*, 434 F.3d 144, 157 (2d Cir. 2006) (using an “exceedingly narrow scope of review” for IJ’s credibility findings).

¹¹⁴ See *infra* Part III.

IV. THE REAL ID ACT

Passed in May 2005 as part of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, the REAL ID Act¹¹⁵ was enacted in response to a congressional concern that non-citizens were exploiting asylum laws, and was designed to address what was deemed “a number of judicial review anomalies improperly favoring criminal aliens that were created by court decisions interpreting changes to the INA in 1996.”¹¹⁶ Under the REAL ID Act, circuit courts are provided with exclusive federal jurisdiction to review constitutional claims and “questions of law” raised in petitions for review of final orders of removal issued by the BIA.¹¹⁷ The purpose of the judicial review provisions of the Act is to permit judicial review over those issues that were “historically reviewable on habeas—constitutional and statutory-construction questions, not discretionary or factual questions.”¹¹⁸

While keeping in place a provision in the Immigration and Nationality Act providing that “no court shall have jurisdiction to review . . . any judgment regarding the granting of relief, or . . . [the] authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of [asylum],”¹¹⁹ the Act provides circuit courts with limited jurisdiction to review constitutional claims and “questions of law” in petitions for review of final agency orders of removal.¹²⁰ Despite the clarity that the REAL ID Act

¹¹⁵ REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, 119 Stat. 302 (codified at 8 U.S.C. § 1252).

¹¹⁶ H.R. REP. NO. 109-72, at 172 (2005), *reprinted in* 2005 U.S.C.C.A.N. 240, 297 (May 3, 2005). *See also supra* Part II.B.

¹¹⁷ 8 U.S.C. § 1252 (2000 & Supp. 2005).

¹¹⁸ 151 CONG. REC. H2813, H2873 (daily ed. May 3, 2005). The Judiciary Committee noted that “habeas review does not cover discretionary determinations or factual issues that do not implicate constitutional due process.” 151 CONG. REC. at H2873. A “‘question of law’ is a question regarding the construction of a statute.” H.R. REP. NO. 109-72, at 175.

¹¹⁹ 8 U.S.C. § 1252(a)(2)(B). This jurisdiction-stripping provision was put in place by IIRIRA, Pub. L. No. 104-208, 110 Stat. 3009, at 3009–597.

¹²⁰ REAL ID Act, § 106(a)(1)(A)(iii) (codified at 8 U.S.C. § 1252(a)(2)(D)).

Nothing in subparagraph (B) or (C), [subsection B is titled “Denials of discretionary relief”] or in any other provision of this Act (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

was intended to bring to the boundaries of federal court jurisdiction over final orders of removal, the precise meaning of “question of law” has been subject to countless interpretive debates.¹²¹

A. Uncertainty Regarding the Precise Meaning of “A Question of Law”

Some circuits have narrowly defined the term “question of law.”¹²² While appellate courts have been in general agreement that challenges directed exclusively at an Immigration Court’s discretionary and factual determinations are outside the scope of judicial review,¹²³ circuit courts have been inconsistent in defining the types of decisions that are discretionary.¹²⁴

Id. Thus, following the enactment of the REAL ID Act, appellate courts were confronted with the question of what effect 8 U.S.C. § 1252(a)(2)(D) had on a circuit court’s authority to review discretionary determinations made by the BIA, such as those falling under 8 U.S.C. § 1229b(b)(1)(D), pertaining to cancellation of removal. *Martinez v. Attorney General*, 446 F.3d 1219, 1222 (11th Cir. 2006).

¹²¹ See, e.g., *Xiao Ji Chen v. Dep’t of Justice*, 434 F.3d 144, 151–52 (2d Cir. 2006) (noting that the term “question of law” provides “no guidance as to the precise content of that phrase”); *Petition for Writ of Certiorari* at 16–17, *Lopez-Cancinos v. Gonzales*, 127 S. Ct. 2127 (2007) (No. 06-740), 2006 WL 3423868 (noting that since the passage of the REAL ID Act circuit courts have struggled to define the term “questions of law,” resulting in “inconsistent decisions between and within circuits”). Left unresolved is whether questions of law includes the application of law to undisputed facts. See also Aaron G. Leiderman, Note, *Preserving the Constitution’s Most Important Human Right: Judicial Review of Mixed Questions Under the REAL ID Act*, 106 COLUM. L. REV. 1367, 1368 (2006) (“Since many questions in immigration law are neither purely factual nor purely legal, but mixed, this omission poses a significant challenge for circuit courts determining the scope of their jurisdiction to review non-citizens’ appeals under REAL ID.”).

¹²² See, e.g., *Higuit v. Gonzales*, 433 F.3d 417, 419 (4th Cir. 2006) (“The REAL ID Act confers upon courts of appeal a narrowly circumscribed jurisdiction to resolve constitutional claims or questions of law raised by aliens seeking discretionary relief.”); *Kamara v. Attorney General*, 420 F.3d 202, 211 (3d Cir. 2005) (finding an appellate court is limited to reviewing “pure questions of law” and to “issues of application of law to fact, where the facts are undisputed and not the subject of challenge”) (citation omitted).

¹²³ See, e.g., *Ferry v. Gonzales*, 457 F.3d 1117, 1130 (10th Cir. 2006); *Hadwani v. Gonzales*, 445 F.3d 798, 800 (5th Cir. 2006); *Grass v. Gonzales*, 418 F.3d 876, 877 (8th Cir. 2005); *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005).

¹²⁴ For instance, the INA provides that the Attorney General, in his discretion, may adjust the status of an alien. 8 U.S.C. § 1255(a) (2000). The Seventh Circuit found that it has jurisdiction to review discretionary decisions denying adjustment of status. *Hamdan v. Gonzales*, 425 F.3d 1051, 1058 (7th Cir. 2005). The Fourth Circuit, however, has held that it lacks jurisdiction to review an immigration judge’s denial of adjustment of status. *Higuit v. Gonzales*, 433 F.3d 417, 420 (4th Cir. 2006).

Several circuits have held that although it permits “discretionary denials of relief,” 8 U.S.C. §1252(a)(2) “does not bar judicial review of rulings that are not discretionary in character.”¹²⁵ The Third Circuit has noted that:

[t]he jurisdiction-stripping language of [the REAL ID Act] applies not to all decisions the Attorney General is entitled to make but to a narrower category of decisions where Congress has taken the additional step to specify that the sole authority for the action is in the Attorney General’s discretion. Put another way, the Attorney General’s general authority to arrive at an outcome through the application of law to facts is distinct from the issue of whether Congress has ‘specified’ that the decision lies in the Attorney General’s discretion and is thus unreviewable.¹²⁶

The Seventh Circuit has correctly acknowledged the lack of clarity inherent in the jurisdictional provisions of the REAL ID Act, noting that “while the purpose of the door-closing statute appears to be to place discretionary rulings beyond the power of judicial review . . . the statute itself, read literally, goes further and places all rulings other than those resolving questions of law or constitutional issues beyond the power of judicial review.”¹²⁷

The inability of appellate courts to determine clearly those discretionary judgments that fall within the category of a “question of law” has not only produced inconsistent results among circuit courts in relief from removal cases, but has also limited the degree of judicial review over removal decisions.¹²⁸ This Note, however, will focus on the inconsistencies as they pertain to petitioners seeking relief from removal in the form of asylum, withholding of removal, and protection under CAT. The REAL ID Act altered the standard governing credibility determinations and the need for corroboration for petitioners seeking relief in such cases.¹²⁹

¹²⁵ *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (referring also to *Ibarra-Flores v. Gonzales*, 439 F.3d 614, 618 (9th Cir. 2006)).

¹²⁶ *Alaka v. Attorney General*, 456 F.3d 88, 95–96 (3d Cir. 2006).

¹²⁷ *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006).

¹²⁸ For an empirical analysis of this conflict, see Kanstroom, *supra* note 34, at 192–93. Kanstroom found that “[o]f all the [circuit court] cases that discussed jurisdiction specifically, 64.86% (179 of 276) found that the courts lacked jurisdiction to review the appeal.” *Id.* at 192. “Before the REAL ID Act, 65.5% (161 of 246) of all cases were jurisdictionally precluded,” but following the REAL ID Act, 60% (18 of 30) were judicially precluded. Further, “54.39% of district court decisions, pre and post-REAL ID, found jurisdiction lacking. At the circuit court level the percentage of jurisdictional preclusions was higher: 67.89%.” *Id.* at 193.

¹²⁹ *Dhima v. Gonzales*, 416 F.3d 92, 95 n.3 (1st Cir. 2005).

The following sections will examine how appellate courts have been inconsistent in applying the REAL ID Act's credibility and corroboration standards and will demonstrate how the Act has had the effect of restricting the scope of judicial review over immigration court decisions. Section B will first discuss how, by narrowly defining what falls within "a question of law," appellate courts have foreclosed the ability of petitioners suffering from improper evidentiary decisions made by immigration courts to seek review in federal courts. The Act effectively bars many important evidentiary issues pertaining to proof of persecution from the scope of federal court jurisdiction.

B. Evidentiary Claims

In the context of claims for withholding of removal, asylum, and CAT protection, proof of the persecution is crucial. Petitioners seeking to prove past persecution "must satisfy a heavy evidentiary burden."¹³⁰ Asylum hearings in particular depend on "narrow and specific factual findings."¹³¹ A considerable amount of criticism has been directed at IJs for making mistakes in reviewing evidence proffered by a petitioner to prove persecution.¹³² At the same time, however, a number of appellate courts have held that they are precluded from reviewing a determination made by an immigration court regarding a petitioner's failure to sustain the burden of proof for establishing persecution.¹³³ A claim that an IJ has "abused his discretion" by "incorrectly

¹³⁰ *Boci v. Gonzales*, 473 F.3d 762, 766 (7th Cir. 2007).

¹³¹ *Chen v. Gonzales*, 434 F.3d 212, 219 (3d Cir. 2005). *See also* *Yang v. Attorney General*, 418 F.3d 1198, 1201 (11th Cir. 2005) ("The weaker an applicant's testimony, . . . the greater the need for corroborative evidence.").

¹³² *See, e.g., Toure v. Attorney General*, 443 F.3d 310, 320 (3d Cir. 2006) (stating that there is "no logical or evidentiary basis for the IJ's conclusion that [the petitioner] was not persecuted on account of one of the statutorily-enumerated grounds"); *Mukamsoni v. Ashcroft*, 390 F.3d 110, 120–21 (1st Cir. 2004) (noting that the BIA focused too narrowly on parts of the record that supported its decision, raised "too high the bar for an asylum claimant seeking to prove past persecution," and erred by focusing only on the applicant's oral testimony).

¹³³ *See, e.g., Jimenez v. Gonzales*, 215 F. App'x 8, 9 (1st Cir. 2007) (holding that it lacked "jurisdiction over petitioner's claims that the IJ erred in denying withholding of removal or relief under CAT" when the petitioner argued that the IJ "erred in determining that he had failed to show that it was likely that he would be persecuted because of any of the five protected grounds, or tortured" according to CAT). A claim that an IJ's determinations were "against the weight of evidence" does not present a question of law. *Id.* *See also* *Donastrong-Martinez v. Attorney General*, 213 F. App'x 107, 111–12 (3d Cir. 2007) (holding that it lacked jurisdiction to review a claim that an IJ erred in making factual findings and in weighing favorable and adverse factors); *Hamid v. Gonzales*, 417

weigh[ing] the evidence, fail[ing] to explicitly consider certain evidence, [or] simply reach[ing] the wrong outcome” does not itself establish a “colorable constitutional claim[.]”¹³⁴ A claim that an IJ erred in evaluating testimony would also likely be deemed outside the scope of federal court jurisdiction.¹³⁵ Appellate courts have asserted that if a petitioner has not challenged a legal standard, an appellate court is precluded from reviewing the claim.¹³⁶ This section will explain how limiting judicial review of evidentiary issues has had unfair consequences for deportable aliens in cases where the administrative record is incomplete or where new country conditions develop.

1. *The Existence of Changed Country Conditions*

Petitions for asylum must be filed within one year of the alien’s arrival in the United States.¹³⁷ The BIA may consider an untimely application if the applicant demonstrates either the existence of “changed circumstances which affect the applicant’s eligibility for asylum” or “extraordinary circumstances”

F.3d 642, 647 (7th Cir. 2005) (holding that it lacked jurisdiction to review an IJ’s denial of CAT relief because the issue came down to whether the immigration judge “correctly considered, interpreted, and weighed the evidence presented”); *Nnani v. Attorney General*, 143 F. App’x 249, 252 (11th Cir. 2005) (holding that it lacked jurisdiction to review a claim involving evidentiary issues, even though the IJ “erred by placing too much weight” on the alien’s testimony and failing to fully consider the U.S. State Department Country Reports). The court in *Nnani* also found that “[t]o the extent she challenges factual findings or credibility determinations, made at the administrative level by the IJ, or the IJ’s rulings on admissibility and probative value, we do not have jurisdiction to grant review . . .” *Id.*

¹³⁴ *Saloum v. U.S. Citizenship & Immigration Servs.*, 437 F.3d 238, 244 (2d Cir. 2006).

¹³⁵ *See, e.g., Bugayong v. INS*, 442 F.3d 67, 72–73 (2d Cir. 2006) (holding that, notwithstanding the REAL ID Act, it lacked jurisdiction to consider the petition for review because the petitioner’s argument that the IJ erred in evaluating his hearing testimony was a challenge to the IJ’s discretion).

¹³⁶ *See, e.g., Caramat-Padilla v. Gonzales*, 220 F. App’x 473, 474 (9th Cir. 2007) (holding that an appellate court is jurisdictionally barred from reviewing a claim that an IJ erred in finding that a petitioner “did not establish it was ‘more likely than not’ that he would be tortured” because it was a challenge to the sufficiency of evidence, not a challenge to the legal standard used by the IJ); *Tran v. Gonzales*, 447 F.3d 937, 943 (6th Cir. 2006) (holding that in the context a claim for relief under CAT, its jurisdiction is limited to whether the BIA used the correct standard and burden of proof in reviewing the IJ’s decision).

¹³⁷ 8 U.S.C. § 1158(a)(2)(B) (2000).

related to the delay in filing an application within the one year time limit.¹³⁸ While prior to the REAL ID Act federal courts were precluded from reviewing any determination pertaining to the one-year asylum bar,¹³⁹ following the REAL ID Act, circuit courts were forced to answer whether this fell within a question of law category.¹⁴⁰

A number of circuits have found that a determination by the BIA that a petitioner failed to demonstrate the existence of changed country conditions or extraordinary circumstances is not a question of law.¹⁴¹ Appellate courts, however, have not been in agreement on whether this operates as an absolute bar on their ability to review any claims involving changed country conditions. While the Eleventh Circuit has held that, regardless of whether a deportable alien's application was timely or whether extraordinary circumstances existed, it lacks jurisdiction to review a denial of asylum on those grounds,¹⁴² the Ninth Circuit has held that in certain cases it has jurisdiction to review a challenge to the IJ's determination that a petitioner failed to show changed circumstances to excuse the untimely filing of an asylum application.¹⁴³

¹³⁸ 8 U.S.C. § 1158(a)(2)(D). *See also* 8 C.F.R. § 208.4(a)(4)(i)(B) (2007) (such changes may include "activities the applicant becomes involved in outside the country of feared persecution that place the applicant at risk").

¹³⁹ 8 U.S.C. § 1158(a)(3) ("No court shall have jurisdiction to review any determination of the Attorney General under paragraph (2) [of 8 USC § 1158(a)].").

¹⁴⁰ *Ramadan v. Gonzales*, 427 F.3d 1218, 1221–22 (9th Cir. 2005), *aff'd* 479 F.3d 646 (9th Cir. 2007), *reh'g and reh'g en banc denied sub nom.* *Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007).

¹⁴¹ *See, e.g., Pavlyk v. Gonzales*, 469 F.3d 1082, 1086 (7th Cir. 2006); *Chahid Hayek v. Gonzales*, 445 F.3d 501, 506–07 (1st Cir. 2006); *Singh v. BIA*, 435 F.3d 216, 218 (2d Cir. 2006).

¹⁴² *Ruiz v. Gonzales*, 479 F.3d 762, 765 (11th Cir. 2007). The Seventh Circuit has also held that

[i]f an application is deemed untimely under the one-year limit or the exceptions . . . , then the statute provides that "[n]o court shall have jurisdiction to review any determination of the Attorney General" We have previously held that this statutory language "is sufficiently specific to show that Congress intended to preclude judicial review of agency action under § 1158(a)(2)."

Pavlyk v. Gonzales, 469 F.3d 1082, 1086 (7th Cir. 2006) (citing 8 U.S.C. § 1158(a)(3) and *Zaidi v. Ashcroft*, 377 F.3d 678, 681 (7th Cir. 2004)).

¹⁴³ *Ramadan v. Gonzales*, 479 F.3d 646, 654–56 (9th Cir. 2007). The Sixth Circuit has similarly noted that "not all changed circumstances cases are necessarily 'predominantly factual.'" *Amir v. Gonzales*, 467 F.3d 921, 924 n.2 (6th Cir. 2006) (noting that in *Almuhtaseb v. Gonzales*, 453 F.3d 743, 748–49 (6th Cir. 2006), the court held that it "did not have jurisdiction over the petitioner's claim of 'changed

Precluding appellate courts from reviewing claims that a petitioner failed to demonstrate “changed circumstances” can have unfair consequences for deportable aliens seeking relief from a legitimate fear of persecution. Conditions in a petitioner’s country of origin often change between the period in which the BIA renders its decision and the time in which an appellate court considers the petition for review, such that there is no longer a basis for the alien’s claim of persecution in the country of removal.¹⁴⁴ The country reports in the administrative record that are used to corroborate claims of persecution are frequently a few years old by the time the petition for review reaches an appellate court, and often fail to accurately reflect current conditions in the country of removal.¹⁴⁵ Despite the problem of “stale” administrative records, appellate courts are limited to considering only the record developed by an immigration court and are generally barred from engaging in further fact finding.¹⁴⁶

circumstances’ because it involved a ‘predominantly factual determination’” (citation omitted)).

¹⁴⁴ See, e.g., *Berishaj v. Ashcroft*, 378 F.3d 314, 317 (3d Cir. 2004) (“[E]ven taking [the petitioner’s] testimony as true, country conditions in the Federal Republic of Yugoslavia had changed such that [the petitioner] could no longer have a well-founded fear of future persecution.”).

¹⁴⁵ *Id.* at 329.

¹⁴⁶ *Id.* at 328–29 (“It is a salutary principle of administrative law review that the reviewing court act upon a closed record. [Though this] yields good results in most cases, in the area of asylum, where claims are heavily dependent on country conditions, it can become an albatross.”). See also *Amir v. Gonzales*, 467 F.3d 921 (6th Cir. 2006) (rejecting a petitioner’s argument that the Immigration Judge “abused its discretion in not receiving further evidence regarding . . . changed circumstances by prematurely premitting [his] asylum application” because the question of whether to admit or not to admit certain evidence is outside the jurisdiction of an appellate court); *Cela v. Gonzales*, 205 F. App’x 376 (6th Cir. 2006) (defining the scope of review as “the administrative record on which the order of removal is based” (quoting 8 U.S.C. § 1252(b)(4))); *Hanan v. Gonzales*, 449 F.3d 834, 836 (8th Cir. 2006) (holding that it is unable to review the “country reports from the years following the IJ’s decision to deny him relief” because it is not part of the administrative record, despite showing a likelihood for torture); *Kamara v. Attorney General*, 420 F.3d 202, 218 (3d Cir. 2005) (“[W]hile the use of stale country reports is particularly problematic and may lead sometimes to absurd or unjust results, ‘courts reviewing the determination of an administrative agency must approve or reject the agency’s action purely on the basis of the reasons offered by, and the record compiled before, the agency itself.’” (quoting *Berishaj v. Ashcroft*, 378 F.3d 314, 330 (3d Cir. 2004))).

2. Remanding to the Agency

Prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, an appellate court had authority to remand cases to the BIA under 28 U.S.C. § 2347(c).¹⁴⁷ This statutory provision permits a party seeking relief from removal “to seek ‘leave to adduce additional evidence’ from the court of appeals in a proceeding reviewing an administrative agency decision if that evidence is material and reasonably unavailable previously” and “also permits a court of appeals to ‘order the additional evidence and any counterevidence’” a party desires to be taken into account by the agency.¹⁴⁸ Following the passage of IIRIRA, § 2347(c) no longer permits an appellate court to order the BIA to consider additional evidence that is offered for the first time on appeal.¹⁴⁹

Despite this statutory bar, the Supreme Court has set forth an “ordinary remand rule.” In *INS v. Ventura*, the Court reversed a Ninth Circuit decision holding that a Guatemalan citizen had met his burden of proving the existence of past persecution, even though the immigration judge and the BIA had failed to address the question of past persecution.¹⁵⁰ The Ninth Circuit, according to the Court, had erred by deciding the issue without first providing the BIA with the opportunity to address the issue.¹⁵¹ Under the ordinary remand rule, a court of appeals is generally precluded from conducting a de novo inquiry into the matter under review and reaching its own conclusions; instead, the proper procedure is to remand to the agency for further investigation or explanation.¹⁵² This “ordinary remand rule” was recently invoked by the Court in *Gonzales v. Thomas*, where the Court reversed and remanded a Ninth Circuit decision holding that the petitioner was persecuted on account of his membership in a social group because the agency has not yet considered whether petitioner’s family qualified as a “particular social group.”¹⁵³

Appellate courts, however, have been unclear on when it is permissible to remand to an immigration court. Certain circuits have been reluctant to

¹⁴⁷ *Lin v. U.S. Dep’t of Justice*, 473 F.3d 48, 52 (2d Cir. 2007) (citing *Osagahe v. INS*, 942 F.2d 1160, 1162 (7th Cir. 1991)).

¹⁴⁸ *Id.* (quoting 28 U.S.C. § 2347(c) (2000)).

¹⁴⁹ *Id.* (referring to 8 U.S.C. § 1252(a) (2000) which provides that a court reviewing a final order of removal “may not order the taking of additional evidence under section 2347(c)”).

¹⁵⁰ 537 U.S. 12, 14 (2002).

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ 547 U.S. 183, 186 (2006).

remand to an immigration court for additional fact finding.¹⁵⁴ The Second Circuit has suggested that, while it lacks statutory authority to grant a motion to remand, it possesses “inherent equitable power” to remand to the BIA.¹⁵⁵ However, in a subsequent opinion, the Second Circuit stated that the exercise of such an inherent power is not warranted if the basis for the remand is an instruction to consider documentary evidence that was not in the record before the BIA and agency regulations set forth procedures to reopen a case before the BIA for the taking of additional evidence.¹⁵⁶

Limiting the authority of an appellate court to remand to an agency is problematic for petitioners since the credibility and corroboration standards of the REAL ID Act have restricted the scope of judicial review. As with the issue of remanding, appellate courts have been similarly inconsistent in applying the credibility and corroboration standards of the REAL ID Act.

¹⁵⁴ See, e.g., *Thomas v. Attorney General*, 210 F. App'x 195, 202 (3d Cir. 2006) (holding that it lacked jurisdiction to remand to the BIA for additional fact finding even though the petitioner claimed that in the four and one-half year period between his hearing before the IJ and the appellate court's review of the administrative record, significant political changes had occurred in Haiti which had worsened human rights conditions). The Third Circuit noted that while remand is permissible under normal administrative review, in immigration cases, it is barred from remanding to the agency for further fact finding and “may not order the taking of additional evidence under” *Id.* Cf. *Liang v. Gonzales*, 217 F. App'x 692, 693 (9th Cir. 2007) (holding that because neither the Immigration Judge nor the BIA addressed whether the petitioner established a well-founded fear of persecution warranting asylum, remand is appropriate in light of *Gonzales v. Thomas*, 547 U.S. 183 (2006) and *INS v. Ventura*, 537 U.S. 12 (2002)); *Saavedra De Barreto v. INS*, 427 F. Supp. 2d 51, 61 (D. Conn. 2006) (noting that “even if the [administrative] record is not sufficiently developed, . . . the courts of appeals could conduct their own fact-finding or at least remand” to the Immigration Court or BIA for additional fact-finding). See also *Lin*, 473 F.3d at 53 (holding that IIRIRA eliminated its authority under § 2347(c) to remand to the BIA so the alien can present additional evidence). But see *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 261–62 (2d Cir. 2007).

¹⁵⁵ *Lin*, 473 F.3d at 52. The Second Circuit remanded the case to the BIA to consider new documentary evidence on forced sterilization practices in the Fujian province of China. *Id.* See also *Xiao Xing Ni*, 494 F.3d at 261–62. These two decisions were a departure from other circuits. See, e.g., *Gebremaria v. Ashcroft*, 378 F.3d 734, 737 (8th Cir. 2004) (declining to supplement the record on appeal with an affidavit from a family member). In *Lin*, the Second Circuit noted that although it agrees with other circuits that IIRIRA eliminated its authority under 28 U.S.C. § 2347 to remand to the Board so that an alien can produce additional evidence, it disagrees with other circuits that an appellate court lacks “any other power to remand.” *Lin*, 473 F.3d at 53–54.

¹⁵⁶ *Xiao Xing Ni v. Gonzales*, 494 F.3d 260, 269 (2d Cir. 2007).

C. *The Credibility of the Applicant and Corroboration of Claims*

The REAL ID Act was enacted in part because

[a]s there are no explicit evidentiary standards for granting asylum in the INA, standards for determining the credibility of an asylum applicant and the necessity for evidence corroborating an applicant's testimony have evolved through the case law of the Board of Immigration Appeals (BIA) and federal courts. Because these standards are not consistent across federal appellate courts, different results have been reached in similar cases, depending on the court that hears the case.¹⁵⁷

However, rather than achieve greater consistency in removal decisions, the REAL ID Act's corroboration and credibility provisions have the effect of restricting the scope of review by federal courts in relief from removal cases and enhancing the discretionary authority of IJs.

This section will discuss how the credibility and corroboration provisions have had the effect of restricting judicial review over final orders of removal. It will also discuss how appellate courts have been inconsistent in applying the corroboration standard of the REAL ID Act.

1. *Credibility Determinations*

Prior to the REAL ID Act, when an IJ determined that a petitioner's testimony lacked credibility, the IJ was to include in his or her decision specific reasons for reaching such a conclusion.¹⁵⁸ An adverse credibility finding was to be "based on issues that go to the heart of the applicant's claim."¹⁵⁹ The REAL ID Act limits the scope of judicial review over an IJ's credibility determinations by providing that those determinations may be made "without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim."¹⁶⁰ The Act provides that

a trier of fact [an IJ] may base a credibility determination on the demeanor, candor, or responsiveness of the applicant's or witness's account, the consistency between the applicant or witness's written and oral statements

¹⁵⁷ H.R. REP. NO. 109-72, at 161 (2005) (Conference Report).

¹⁵⁸ *Amir v. Gonzales*, 467 F.3d 921, 925 (6th Cir. 2006).

¹⁵⁹ *See id.* (citation omitted); *Giday v. Gonzales*, 434 F.3d 543, 550 (7th Cir. 2006).

¹⁶⁰ Pub. L. 109-13, § 101(a)(3), 119 Stat. 231, 303 (2005) (codified at 8 U.S.C. § 1158(b)(1)(B)(iii) (2000)).

... the internal consistency of each such statement ... the consistency of such statements with other evidence of the record ...¹⁶¹

No presumption of credibility exists; however, if no credibility determination is explicitly made, the applicant "shall have a rebuttable presumption of credibility on appeal."¹⁶²

Following the REAL ID Act, issues addressed by circuit courts in the past and "often leading to favorable outcomes for asylum claimants are no longer subject to review."¹⁶³ In *In re S-B-*, a petitioner appealed to the BIA an IJ's ruling that invoked the credibility standards set forth in the REAL ID Act.¹⁶⁴ The IJ based his adverse credibility finding on events "tangential" to the respondent's claim to mistreatment in Guinea, his country of origin,¹⁶⁵ such as a discrepancy between the respondent's statement that he arrived at JFK airport, and his witness's statement that he arrived at Newark airport, and a "purported discrepancy" between the respondent's account of arrests in Guinea-Bissau and the Department of State's account of favorable treatment of refugees in Guinea-Bissau.¹⁶⁶ The IJ also based his adverse credibility determination on the petitioner's omission of any reference to the death of his father in his asylum application, which the IJ found significant given the respondent's testimony that his father had been imprisoned and killed on account of his political activities.¹⁶⁷ In making his credibility assessment in this case, the IJ relied on the REAL ID Act, contending that he could give

¹⁶¹ *Id.*

¹⁶² *Id.* § 101(a)(3)(B)(iii). The new credibility provisions are a significant departure from previous case law. *See, e.g.,* *Secaida-Rosales v. INS*, 331 F.3d 297, 308 (2d Cir. 2003) ("An applicant's failure to list in his or her initial application [for asylum and withholding of removal] facts that emerge later in testimony will not automatically provide a sufficient basis for an adverse credibility finding."); *Gao v. Ashcroft*, 299 F.3d 266, 272 (3d Cir. 2002) (noting that minor discrepancies that do not involve the "heart of the asylum claim" are not an adequate basis for an adverse credibility finding); *Campos-Sanchez v. INS*, 164 F.3d 448, 450 (9th Cir. 1999) ("[I]nconsistencies of less than substantial importance for which a plausible explanation is offered' cannot form the sole basis for an adverse credibility finding.") (citation omitted).

¹⁶³ Jill A. Apa & Sophie I. Feal, *Two Steps Forward, One Step Back: The Future of Credibility Findings by Circuit Courts in Asylum Cases Under the REAL ID Act of 2005*, 11 BENDER'S IMMIGR. BULL. 376 (2006).

¹⁶⁴ 24 I. & N. Dec. 42 (BIA 2006).

¹⁶⁵ *Id.* at 45.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 45 n.5. In his asylum application, the respondent checked a box indicating that his father was "deceased," with the explanatory note, "in jail." *Id.*

consideration to inconsistencies and omissions, whether or not they go to the heart of the claim.¹⁶⁸

The new credibility requirements set forth in the REAL ID Act create the potential for abuse since IJs have often denied requests for relief from removal based on minor inconsistencies.¹⁶⁹ A Ninth Circuit case, *Jibril v. Gonzales*, aptly illustrates this problem. Jibril was a member of a minority clan in Somalia and applied for asylum in the United States.¹⁷⁰ The IJ found that Jibril's testimony was not credible because of an apparent inconsistency between Jibril's statement that he was pretending to be dead when members of the United Somali Congress militia raided his house, and his statement that he was able to see the types of weapons the soldiers were carrying.¹⁷¹ The IJ also found it "implausible that Jibril could have remained unresponsive while being kicked in the head, that Jibril could have survived a gunshot wound," and that Jibril's "demeanor in testifying showed much evasiveness."¹⁷² While the Ninth Circuit remanded the case because the petition was filed prior to when the REAL ID Act went into effect, it noted

¹⁶⁸ *Id.* at 46. The BIA noted that this was inconsistent with the law of the Sixth Circuit, the controlling jurisdiction in the case, holding that an IJ's adverse credibility determination must be based on issues that go to the "heart of the applicant's claim." *Id.* While the BIA remanded for further findings using Sixth Circuit standards, this was done only because the Board found that the application was filed with an asylum officer prior to the passage of the REAL ID Act. *Id.* at 45–46. Had the REAL ID Act applied, the BIA most likely would have affirmed the IJ's opinion.

¹⁶⁹ See, e.g., *Bao v. Gonzales*, 460 F.3d 426, 431 (2d Cir. 2006) (recognizing that the IJ denied the asylum application on adverse credibility grounds based on discrepancies between applicant's testimony and her husband's independent asylum application and interview); *Giday v. Gonzales*, 434 F.3d 543, 549 (7th Cir. 2006) (noting that the IJ made an adverse credibility determination based on perceived inconsistencies in the applicant's statements, although the appellate court noted that this was merely the result of a translation error); *Dawoud v. Refaat*, 424 F.3d 608, 610 (7th Cir. 2005) (observing that IJ found petitioner not credible "because of the 'swiftness' with which he obtained his passport and travel visa"); *Vasha v. Gonzales*, 410 F.3d 863, 869 (6th Cir. 2005) (overturning IJ's finding that asylum applicant was inconsistent in his testimony; according to appellate court, because the implausibilities identified by the IJ had no basis in the record and the omissions were not substantially related to the asylum claim); *Mukamusoni v. Ashcroft*, 390 F.3d 110, 120–21 (1st Cir. 2004) (finding that the IJ improperly focused on applicant's oral testimony in rejecting her claim of persecution when the affidavit was replete with information).

¹⁷⁰ *Jibril v. Gonzales*, 423 F.3d 1129, 1132 (9th Cir. 2005).

¹⁷¹ *Id.* at 1134.

¹⁷² *Id.* at 1136–37.

that were the REAL ID Act to apply to Jibril's petition, the court would be obliged to deny his petition.¹⁷³

This marks a considerable departure from appellate court decisions prior to the REAL ID Act where a circuit court would generally affirm an adverse credibility determination only where it was "supported by 'specific cogent reasons' that 'bear a legitimate nexus to the finding.'"¹⁷⁴ While an appellate court would accord deference to an IJ's credibility determination, adverse credibility determinations were not to be "grounded in trivial details or easily explained discrepancies [that lack a] 'legitimate nexus to the finding.'"¹⁷⁵

Limitations on judicial review of an IJ's credibility determination is troubling because, while appellate courts have permitted IJs to base adverse credibility determinations on inconsistencies, many of these inconsistencies are not the result of a petitioner making false assertions about the likelihood that they would be persecuted if returned to their country of origin.¹⁷⁶

2. Corroborating Claims of Persecution

The REAL ID Act's corroboration provisions also have the effect of limiting judicial review over relief from removal cases and have produced inconsistent decisions with respect to the corroboration standards. The Act provides that "[no] court shall reverse a determination made by a trier of fact [IJ] with respect to the availability of corroborating evidence . . . unless the court finds . . . that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable."¹⁷⁷ The REAL ID Act permits an

¹⁷³ *Id.* at 1138 n.1 ("His demeanor and *any* inaccuracies in his statements, *without regard to whether they go to the heart of his claim*, would all be valid bases for the IJ's adverse credibility determination. . . . Such high deference is what the law requires today, though in this case, and in the thousands of other petitions filed before the effective date of the Act, our precedent frustrates its expression.").

¹⁷⁴ *Uwase v. Ashcroft*, 349 F.3d 1039, 1041 (7th Cir. 2003) (citation omitted). *Accord* *Daneshvar v. Ashcroft*, 355 F.3d 615, 623 (6th Cir. 2004); *Gao v. Ashcroft*, 299 F.3d 266, 276 (3d Cir. 2002); *Shah v. INS*, 220 F.3d 1062, 1068 (9th Cir. 2000).

¹⁷⁵ *Korniejew v. Ashcroft*, 371 F.3d 377, 387 (7th Cir. 2004) (citation omitted).

¹⁷⁶ *See, e.g., Castaneda-Castillo v. Gonzales*, 464 F.3d 112, 114 n.6 (1st Cir. 2006) (finding some of the supposed inconsistencies in the applicant's testimony were the result of faulty translations); *Pergega v. Gonzales*, 417 F.3d 623, 630 (6th Cir. 2005) (finding errors in the translation of an affidavit contributed to perceived inconsistencies in the petitioner's testimony).

¹⁷⁷ Pub. L. No. 109-13, 119 Stat. 231, 305 (2005) (codified at 8 U.S.C. § 1252(b)(4)). Prior to the REAL ID Act the standard for corroboration was: "[t]he testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration." 8 C.F.R. §§ 208.13(a), 208.16(b) (2005).

IJ to require an otherwise credible applicant “to provide corroborating evidence in certain circumstances.”¹⁷⁸

Appellate courts have been inconsistent and unclear in applying the REAL ID Act’s corroboration standards. For instance, in *Zhang v. Gonzales*, the Seventh Circuit noted that the REAL ID Act requires only that an IJ’s determination that an alien should provide corroborating evidence to supplement the alien’s testimony is entitled to “reasonable deference.”¹⁷⁹ Zhang’s claim to political asylum and withholding of deportation was based on his opposition to China’s forced family-planning regulations and his experience as a victim of that policy in China.¹⁸⁰ An IJ denied his request for asylum on grounds that Zhang had failed to provide corroborating evidence, such as a hospital record, indicating that his wife was subject to a forced abortion,¹⁸¹ and evidence that he was married.¹⁸² The *Zhang* court vacated the IJ’s denial of withholding of removal and asylum,¹⁸³ in part because the IJ’s demand for corroborating evidence was “unsubstantiated” and “implausible.”¹⁸⁴

On similar facts, in *Chen v. Gonzales*, the Third Circuit upheld a BIA decision denying an application for asylum, withholding of removal, and CAT protection on grounds that the petitioner’s claim that she was persecuted because she was subject to a forced abortion was insufficiently corroborated.¹⁸⁵ Applying the REAL ID Act’s standard of review on corroboration, the court in *Chen* stated, “There is nothing in the record to suggest that a reasonable trier of fact would be compelled to conclude that

¹⁷⁸ *San Kai Kwok v. Gonzales*, 455 F.3d 766, 769 (7th Cir. 2006) (citation omitted). See also Jared Joyce-Schleimer, *Developments in the Legislative Branch: The State of the REAL ID Act of 2005*, 19 GEO. IMMIGR. L.J. 611, 612 (2005) (stating the REAL ID Act “constricts judicial review of IJs’ determinations . . . [T]hus [the Act] establish[es] a deferential factual review standard where previously there was no set standard”).

¹⁷⁹ 434 F.3d 993, 998 (7th Cir. 2006) (citation omitted) (“The precondition to deference is that the immigration judge explain . . . why he thinks corroborating evidence, if it existed, would have been available to the alien. . . . [A] determination of availability must rest on more than implausible assertions backed up by no facts.”). See also *Hor v. Gonzales*, 421 F.3d 497, 500–01 (7th Cir. 2005) (rejecting the IJ’s demand for corroboration of an alien’s account of abuse in the form of affidavits by co-workers, because the IJ gave no explanation for thinking the co-workers would provide such affidavits in light of the murderous nature of the group involved).

¹⁸⁰ *Zhang*, 434 F.3d at 995.

¹⁸¹ *Id.* at 996–97.

¹⁸² *Id.* at 998.

¹⁸³ *Id.* at 1002.

¹⁸⁴ *Id.* at 999.

¹⁸⁵ 434 F.3d 212, 221–22 (3d Cir. 2005).

corroborating evidence is unavailable.”¹⁸⁶ The petitioner’s only corroboration was a document that she referred to as an abortion certificate and an unsworn affidavit from her father who was still in China, stating that Chen had been “seized by ‘village cadres’” from her aunt’s home and taken to the hospital where she was forced to undergo an abortion.¹⁸⁷

Although the country reports that the IJ considered in *Chen* indicated that the practice of coercing women to have an abortion still occurs, the Third Circuit upheld the IJ’s conclusion that since the abortion certificate was not authenticated, it was not adequate proof of a forced abortion.¹⁸⁸ While the Seventh Circuit in *Zhang* found it unreasonable to expect corroboration in cases of forced abortions,¹⁸⁹ the Third Circuit applying the corroboration standard of the REAL ID Act has held that it is reasonable for an IJ to demand that a petitioner provide corroborating evidence to prove forced sterilization.¹⁹⁰

Restricting the degree of judicial review over an IJ’s corroboration determinations is troubling because circuit courts frequently find that IJs request documentation that is “irrelevant” or “unavailable.”¹⁹¹ Moreover, corroborating asylum claims is often not feasible, particularly since “[m]ost asylum seekers will not come to court equipped with notarized affidavits from their persecutors stating, ‘I Joe Persecutor, beat and tortured your client

¹⁸⁶ *Id.* at 220 (citation omitted).

¹⁸⁷ *Id.* at 218.

¹⁸⁸ *Id.* at 218–19.

¹⁸⁹ *See Zhang*, 434 F.3d at 999–1000.

¹⁹⁰ *See Zheng v. Gonzales*, 417 F.3d 379, 382–83 (3d Cir. 2005). However, in a case where the petitioner had provided the immigration judge with an abortion certificate as corroboration, the Third Circuit, invoking the REAL ID Act’s corroboration standards, upheld the IJ’s denial of petitioner’s applications for asylum, withholding of removal, and relief under the CAT based on insufficient corroboration. *Ding v. Attorney General*, 193 F. App’x 155, 158 (3d Cir. 2006).

¹⁹¹ *Tebo*, *supra* note 21, at 39. *See also Sukwanputra v. Gonzales*, 434 F.3d 627, 636 (3d Cir. 2006) (“The IJ refused to give any weight to unauthenticated documentary evidence, [where] the evidence, if genuine, would have corroborated the petitioner’s testimony.”); *Diallo v. Gonzales*, 439 F.3d 764, 766 (7th Cir. 2006) (holding that it was unreasonable for the IJ to expect a Guinean asylum applicant to provide documents from the opposition political party and from newspapers about a demonstration the newspaper might not have reported); *Benslimane v. Gonzales*, 430 F.3d 828, 832–33 (7th Cir. 2005) (noting that the BIA ordered an alien deported “because he failed to produce a document that was . . . peripheral to his claim”); *Mukamsoni v. Ashcroft*, 390 F.3d 110, 122 (1st Cir. 2004) (noting that “the record does not support BIA’s conclusion that [the petitioner] insufficiently corroborated her testimony” when petitioner submitted documentary evidence).

on three occasions . . . on account of her political opinion”¹⁹² A lack of corroborating documents did not pose as severe a problem for deportable aliens prior to the REAL ID Act. Under the pre-REAL ID Act standard, an IJ who denied an asylum claim for lack of corroboration was expected to first make an express credibility finding and explain why it is reasonable to expect corroboration; an IJ, most importantly, was not to “require an applicant to submit irrelevant corroborating evidence.”¹⁹³ Under the REAL ID Act, an IJ is permitted to require corroboration even if he determines the applicant is credible.¹⁹⁴

V. ACHIEVING THE APPROPRIATE BALANCE: JUDICIAL EFFICIENCY AND PROCEDURAL FAIRNESS IN REMOVAL PROCEEDINGS

Conflicting tensions inhere in judicial review of final orders of removal. On the one hand, a certain amount of agency discretion is desirable in order to limit the caseload of immigration appeals in federal courts; “‘questions of law’ could not have been intended to expand [appellate courts’] jurisdiction

¹⁹² Marisa Silenzi Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise*, 43 HARV. J. ON LEGIS. 101, 122 (2006) (“[M]any asylum seekers arrive from countries that lack . . . adequate communication systems, and . . . functioning government[s].”). Obtaining documents such as a birth certificate or medical report involve logistical impediments. *Id.* Often, the more legitimate the persecution, the less likely it is that the asylum seeker will have the required proof. *Id.* In removal proceedings, a petitioner is further removed from the alleged persecution than an alien who enters the United States and then requests asylum because many of them have been in the United States for several years. In *Thomas v. Attorney General*, for instance, the Third Circuit stated that

[a]lthough we agree that [petitioner] has not established the likelihood of torture under our precedent, we nevertheless hasten to add a note of caution insofar as the BIA seems to have expected documentary evidence of threats against [petitioner] by Haitian drug dealers. It is highly unlikely that drug dealers, or those associated with them, would generate documentary evidence of illegal activity or threats of revenge against someone who has cooperated with the government. The BIA did not elaborate upon the kind of documentary evidence [petitioner] might reasonably be expected to have of any such threats

210 F. App’x 195, 199 n.3 (3d Cir. 2006). *See also* Gjerazi v. Gonzales, 435 F.3d 800, 809 (7th Cir. 2006) (“Contrary to the IJ’s reasoning . . . it seems illogical to require a family fleeing a country to . . . collect documents in order to corroborate an asylum claim.”).

¹⁹³ *San Kai Kwok v. Gonzales*, 455 F.3d 766, 771 (7th Cir. 2006).

¹⁹⁴ KURZBAN, *supra* note 13, at 435.

in such a boundless fashion.”¹⁹⁵ On the other hand, “granting deference to administrative tribunals does not mean we have clothed their rulings with that kind of power expressed in the maxim the ‘king can do no wrong.’”¹⁹⁶ Admittedly, the REAL ID Act was an attempt to achieve such a balance, reflecting a congressional intent “to streamline immigration proceedings and to expedite removal while restoring judicial review of constitutional and legal issues.”¹⁹⁷

As this Note has demonstrated, the REAL ID Act has failed to achieve this. This Part will provide suggestions for reducing the high volume of immigration appeals in circuit courts, while also ensuring that deportable aliens are provided with fair removal proceedings that comport with requirements of procedural due process. These solutions include: reinstating district court review, changes at the immigration court level, and a new standard of judicial review that takes into account the distinct purpose and function of immigration courts.

A. Reinstating District Court Review

One solution to reducing the high volume of immigration cases in circuit courts is reinstating district court review of final orders of removal, a procedure that was in place prior to the passage of the REAL ID Act. Since the federal district courts have been essentially stripped of any authority to review immigration cases, the circuit courts are currently overloaded with immigration appeals.¹⁹⁸ It has been further noted by one federal district court that circuit courts are an “inadequate” forum for judicial review of an agency determination because “it effectively bars these litigants from receiving an evidentiary hearing.”¹⁹⁹

¹⁹⁵ *Xiao Ji Chen v. Gonzales*, 434 F.3d 144, 152 (2d Cir. 2006), *reh'g granted*, 471 F.3d 315 (2d Cir. 2006) (holding that “questions of law” does not mean all questions having a legal dimension because the section only covers certain legal claims). *See also* *Higuit v. Gonzales*, 433 F.3d 417, 420 (4th Cir. 2006) (“We are not free to convert every immigration case into a question of law, and thereby undermine Congress’s decision to grant limited jurisdiction over matters committed in the first instance to the sound discretion of the Executive.”).

¹⁹⁶ *Fessehay v. Gonzales*, 414 F.3d 746, 752 (7th Cir. 2005) (citation omitted).

¹⁹⁷ *Grass v. Gonzales*, 418 F.3d 876, 879 (8th Cir. 2005).

¹⁹⁸ *Apa & Feal*, *supra* note 167, at 376. While district courts still retain jurisdiction over immigration matters that are independent of removal, a large volume of immigration appeals are challenges to final orders of removal. *Benson*, *supra* note 19, at 42–43. *See, e.g.*, *Channer v. Dep’t of Homeland Sec.*, 406 F. Supp. 2d 204, 208 (D. Conn. 2005).

¹⁹⁹ *Wahab v. Attorney General*, 373 F. Supp. 2d 524, 525 (E.D. Pa. 2005) (noting that since a reviewing court is to decide the petition only on the administrative record,

Prior to the passage of the REAL ID Act, the habeas corpus statute, 28 U.S.C. § 2243 (2000), permitted aliens “to proffer evidence at an evidentiary hearing, enabling a judge to make factual findings.”²⁰⁰ Appellate courts however, are not permitted to engage in factual developments but are expected to be limited in their review to the administrative record.²⁰¹ Reinstating district court review would provide more meaningful review of deportation proceedings than the current congressional proposal to limit all immigration appeals to a single circuit court.²⁰²

B. Basic Changes at the Immigration Court Level

It has been noted by Judge Posner that “disturbing features” of the handling of cases by immigration judges include a lack of familiarity with foreign cultures, insensitivity to misinterpretation caused by the use of translators, and insensitivity to the difficulty of making a credibility determination on the deportment of a person from a foreign culture.²⁰³ In defense of the judges, the National Association of Immigration Judges attributes poor decisions to a lack of resources, a high volume of cases, and

aliens are deprived of the ability to present evidence at a hearing). *See also* *Brempong v. Chertoff*, No. Civ. 305CV733PCD, 2006 WL 618106 (D. Conn. Mar. 10, 2006) (practitioner arguing that the REAL ID Act may provide an inadequate substitute forum because it bars aliens contesting removal from receiving an evidentiary hearing).

²⁰⁰ *Wahab*, 373 F. Supp. 2d at 524–25. *See also* Hafetz, *supra* note 58, at 2534–35 (discussing common law habeas and noting that judges were not precluded from reviewing facts in habeas).

²⁰¹ *See* *Hamid v. Gonzales*, 417 F.3d 642, 647 (7th Cir. 2005).

²⁰² While the Senate Judiciary Committee contends that designating a single court to handle all appeals from immigration courts would provide a uniform standard for immigration decisions and discourage immigrants from “shopping for favorable courts,” critics argue that the D.C. Circuit Court lacks the expertise to handle complex immigration cases. Swarns, *supra* note 17. Designating one court to handle all immigration cases is also problematic according to critics because “federal law evolves in large part based on ‘circuit splits,’ differences in rulings among appellate courts, which the Supreme Court resolves.” Editorial, *supra* note 20. One court hearing all immigration appeals would possess “inordinate power” to make immigration law. *Id.*

²⁰³ *Iao v. Gonzales*, 400 F.3d 530, 533–35 (7th Cir. 2005). *See also* *Toure v. Attorney General*, 443 F.3d 310, 320 (3d Cir. 2006) (“The IJ’s . . . conclusion that Cote d’Ivoire’s civil conflict is not regional or ethnic in nature—is contrary to every official account of Cote d’Ivoire’s civil war, as well as [the petitioner’s] testimony. . . . Nothing in [his] testimony supports the IJ’s conclusion that he was not persecuted on account of some combination of his ethnicity, religion, political opinion and imputed political opinion.”).

increased pressure to resolve cases quickly.²⁰⁴ Former Attorney General Gonzales's proposal to institute performance evaluations and hire more immigration judges,²⁰⁵ while a step in the right direction, is not sufficient.²⁰⁶ Additional funding should be allocated to immigration courts to increase the number of immigration judges and improve the quality of translators present at immigration hearings.²⁰⁷ In addition to the proposals offered by Gonzales, the possibility of ending summary affirmances should also be considered.

C. Eliminating Affirmances Without Opinion (AWOs)

In response to what was deemed "an enormous and unprecedented" increase in the number of appeals to the BIA, the INS promulgated regulations in 1999 to streamline administrative appeals of immigration court decisions.²⁰⁸ Prior to the adoption of the streamlining regulations, a three-judge BIA panel would review an IJ's decision, but the 1999 regulations authorized a single BIA member to affirm an IJ's decision without issuing an opinion—something referred to as Affirmances Without Opinion (AWOs).²⁰⁹ In 2002, former Attorney General John Ashcroft further expanded the use of AWOs in order "to reduce delays in the review process, enable the Board to

²⁰⁴ Arhancet, *supra* note 24, at 334–35. The immigration judges have "a voluminous caseload and work constantly and tirelessly to pick away at reducing this large mountain of cases." Amy C. Hoogasian, Commentary, *Immigration Judges*, CHI. TRIB., Oct. 13, 2006, at C30. One possible explanation for disparities in immigration court decisions is that Immigration Judges schedule 30 to 70 cases at a time in the absence of law clerks, bailiffs, stenographers, or enough competent lawyers. *Id.*

²⁰⁵ Richard B. Schmitt, *Immigration Judges Get New Regulations*, L.A. TIMES, Aug. 10, 2006, at A15 (stating that Gonzales has proposed establishing periodic performance evaluations and implementing proficiency exams for judges who are appointed after December 31, 2006). Currently, there are approximately 224 Immigration Judges. Gonzales has also proposed adding four members to the 11-person BIA. *Id.*

²⁰⁶ A number of immigration judges fear that the performance evaluations suggested by Gonzales would "increase pressure on all judges to make decisions faster, without weeding out the handful of judges who have drawn the most criticism." Bernstein, *supra* note 25. The performance evaluations also raise concerns for "the independence of judges who by statute are supposed to be neutral, independent decision makers, despite working for the Attorney General." *Id.*

²⁰⁷ It is alleged that immigration judges wrongly deport people based on erroneous evidence or incompetence. "In one instance, an appellate board found that a political asylum case involving an Albanian citizen was mishandled because the immigration judge relied on testimony from a document expert who did not speak or read Albanian." Schmitt, *supra* note 206.

²⁰⁸ See Board of Immigration Appeals: Streamlining, 64 Fed. Reg. 56,135, 56,135–36 (Oct. 18, 1999) (codified at 8 C.F.R. §§ 1003.1–2 (2007)).

²⁰⁹ Chong Shin Chen v. Ashcroft, 378 F.3d 1081, 1086 (9th Cir. 2004).

keep up with its caseload and reduce the existing backlog of cases.”²¹⁰ A single board member can currently issue an AWO if he believes that the IJ reached the correct decision, even if the immigration judge’s reasoning is faulty.²¹¹ A single member of the BIA can also affirm an oral opinion issued by an IJ.²¹²

Since the streamlining regulations were implemented, a number of criticisms have been directed at the use of AWOs.²¹³ Permitting a single board member to affirm an IJ’s decision provides a considerable amount of discretion in a single board member, which is problematic.²¹⁴ Moreover, the streamlining regulations have not achieved their desired goal of efficiency, nor have they reduced the high volume of immigration appeals in federal courts.²¹⁵ Ironically, the procedural changes had the effect of increasing the number of immigration cases filed in federal courts.²¹⁶

²¹⁰ Board of Immigration Appeals: Procedural Reforms to Improve Cases Management, 67 Fed. Reg. 54,878, 54,883 (Aug. 26, 2002) (codified at 8 C.F.R. § 1003.1 (2007)). These regulations reduced the size of the Board to eleven members and were promulgated because it was determined that the Board had been unable to adjudicate immigration appeals in removal proceedings efficiently in response to the growing volume of immigration cases. *Id.* at 54,878. The regulations further limited de novo review of factual issues. 8 C.F.R. § 1003.1(d)(3) (2007).

²¹¹ Cruz, *supra* note 62, at 482–83.

²¹² See 8 C.F.R. § 1240.50(a) (2007) (stating that the decision of the immigration judge may be oral or written). As Judge Posner noted, affirmances without an opinion or with a “very short, unhelpful, boilerplate opinion,” is one of the disturbing features of immigration cases. *Iao v. Gonzales*, 400 F.3d 530, 534–35 (7th Cir. 2005). The summary affirmances and non-publication practices are also at odds with the principles of judicial transparency and accountability. See Richard Acello, *Asylum Logjam: Streamlined Immigration Cases Are Flooding Federal Appeals Courts*, 91 A.B.A. J. 18, 20 (2005).

²¹³ See, e.g., Guendelsberger, *supra* note 99, at 644 (“[A] Board order which affirms only the result of the immigration judge’s decision fails to provide meaningful review or a reasoned decision for circuit court review.”); Schmitt, *supra* note 206 (stating that immigrant rights groups allege that the 2002 regulations denied non-citizens their rights to due process); Ahmed-Ullah & Yates, *supra* note 24 (stating that critics find AWOs allow for “rubber-stamping” of bad immigration court decisions). While a number of petitioners have argued that the single member affirmances of an IJ’s decisions violate procedural due process, virtually all courts have upheld the procedure. KURZBAN, *supra* note 13, at 848.

²¹⁴ See, e.g., Legomsky, *supra* note 66, at 1625–27 (explaining that judges are influenced by a range of external factors such as “their own social and economic backgrounds and attitudes, their own conceptions of the role of a court, and the social and political climate of the relevant period”). Thus, providing a high level of discretionary authority to one member of a board can have dangerous consequences.

²¹⁵ Following the 2002 streamlining regulations, the rate of Board member rulings against foreigners facing deportation increased dramatically. Schmitt, *supra* note 206, at

Commenting on the use of three member panels in 2002, it is noted that, “[g]one are the days when the board actually crafted a body of case law, providing guidance to judges and to those who appear before them.”²¹⁷ A number of federal judges have also argued that the streamlining regulations, which reduced the number of judges on the board to 11 from 23, turned the board’s internal review of IJs’ decisions into “a rubber stamp, shifting the burden of re-examination to the federal courts.”²¹⁸ Since summary affirmances fail to provide individualized assessment of claims,²¹⁹ more than one BIA member should review an IJ’s decision.

D. Towards a New Judicial Standard

The degree of judicial deference that is generally accorded to administrative agencies should not be accorded to immigration courts. The Attorney General “created the Board of Immigration Appeals (BIA), names its members, defines its jurisdiction, has the power to dissolve it any time she wishes, and may reverse any of its decisions.”²²⁰ Since immigration law is

15. Those rulings in turn led to more appeals in federal courts, creating another backlog of cases. *Id.* Since immigrants felt that their claims were not properly reviewed by a single member of the Board, they filed petitions for review in federal courts of appeals. Ahmed-Ullah & Yates, *supra* note 24, at 22. See also Acello, *supra* note 213, at 20 (explaining that the number of BIA decisions appealed to the federal courts compared with the total number of BIA decisions has increased from 5% before 2002 to a current level of 25%; before the new regulations, federal courts were receiving about 125 BIA case appeals per month; now they are receiving about 1,000 to 1,200 per month).

²¹⁶ See John R.B. Palmer, *Why are so Many People Challenging Board of Immigration Appeals Decisions in Federal Court? An Empirical Analysis of the Recent Surge in Petitions for Review*, 20 GEO. IMMIGR. L.J. 1, 3 (2005) (“The procedural changes and the overall pressure to reduce the backlog have caused the BIA to issue many more decisions each month, so it is reasonable to expect a proportionate increase in petitions for review reaching federal courts. The surge however, has been disproportionately large.”).

²¹⁷ Compennolle, *supra* note 64, at 30 (letter to the editor written by immigration attorneys).

²¹⁸ Bernstein, *supra* note 25. See also *Immigration Litigation Reduction: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Hon. Carlos T. Bea, Circuit Judge), available at http://judiciary.senate.gov/testimony.cfm?id=1845&wit_id=5213 (explaining that since the BIA instituted its one-judge review, without the more former detailed review, the number of appeals from BIA rulings has increased).

²¹⁹ See, e.g., *Galina v. INS*, 213 F.3d 955, 958 (7th Cir. 2000) (noting that the board’s analysis was “woefully inadequate”).

²²⁰ Legomsky, *supra* note 65, at 1630.

arguably more susceptible to political pressure,²²¹ greater judicial review is required in reviewing Immigration Court decisions than the decisions of other administrative agencies.

1. *A New Standard of Review*

Currently, the standard and scope of judicial review over final orders of removal is: “the court of appeals shall decide the petition only on the administrative record on which the order of removal is based, the administrative findings of fact are conclusive unless” manifestly contrary to law, and “the Attorney General’s discretionary judgment whether to grant relief under section 1158(a) [the granting of asylum provision] shall be conclusive unless manifestly contrary to the law and an abuse of discretion.”²²² It has been argued that “courts should interpret REAL ID’s restoration of jurisdiction over ‘questions of law’ to include . . . a mixed standard of review, requiring circuit courts to defer to agency findings of historical facts, but to engage in de novo review of findings of ultimate fact.”²²³

The Second Circuit has recently stated that:

while we lack jurisdiction to consider ‘mere disagreement’ with the IJ’s factual findings and exercise of discretion, a reviewable issue of law *may* arise in the case of fact-finding which is flawed by an error of law, such as might arise where the IJ states that his decision was based on petitioner’s failure to testify to some pertinent fact when the record of the hearing reveals unambiguously that the petitioner did testify to that fact.²²⁴

²²¹ See, e.g., Neuman, *supra* note 67, at 641 (explaining that “extraordinary provisions” regulating aliens have generally emerged during periods of war or national emergency); PHILIP G. SHRAG, *A WELL-FOUNDED FEAR: THE CONGRESSIONAL BATTLE TO SAVE POLITICAL ASYLUM IN AMERICA* 225 (2000) (noting that Congress passed IIRIRA in 1996 just as a wave of postwar anti-immigrant sentiment spread across the United States). See also Daniel Kanstromm, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 704 (1997).

²²² 8 U.S.C. § 1252(b)(4) (2000).

²²³ Leiderman, *supra* note 121, at 1368 (proposing that when a court is presented with a mixed question of law and fact, the court should analyze it to the extent there are legal elements, but should not review any factual elements).

²²⁴ Liu v. INS, 475 F.3d 135, 137–38 (2d Cir. 2007) (citation omitted) (holding that the IJ mischaracterized a central element of the record). However, it is unclear the extent to which the Second Circuit will apply this standard, as it has also held that it is unable to review a decision committed by statute to the Attorney General. See *Avendano-Espejo v. DHS*, 448 F.3d 503, 505 (2d Cir. 2005).

The Ninth Circuit has recently adopted a similar approach, stating that “our jurisdiction over ‘questions of law’ as defined in the REAL ID Act includes not only ‘pure’ issues of statutory interpretation, but also application of law to undisputed facts, sometimes referred to as mixed questions of law and fact.”²²⁵ This approach, however, has not been followed by all circuits.²²⁶

In the context of claims for asylum, withholding of removal due to a fear of persecution, and protection under the CAT, federal courts could employ the “benefit of the doubt standard” set forth in the *U.N. Handbook*. Acknowledging that asylum seekers fleeing persecution are often unable to provide documentary evidence to substantiate their claims, the *Handbook* suggests, “if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.”²²⁷ The *Handbook*, however, is not binding on U.S. immigration officials and American courts.²²⁸

2. Altering the Ordinary Remand Rule

There is currently no procedure or “statutory mechanism” by which a petitioner may make a motion in the court of appeals to remand for consideration of newly acquired evidence to satisfy a petitioner’s burden of proving persecution if removed from the country.²²⁹ Currently, circuit courts

²²⁵ *Ramadan v. Gonzales*, 479 F.3d 646, 648 (9th Cir. 2007) *reh’g and reh’g en banc denied sub nom.* *Ramadan v. Keisler*, 504 F.3d 973 (9th Cir. 2007) (holding that it had jurisdiction to review an IJ’s decision that a petitioner failed to show changed circumstances to excuse an untimely filing of an asylum application). This is a departure from the Ninth Circuit’s earlier position where it held that a question of law “refers to a narrow category of issues regarding statutory construction.” *Ramadan v. Gonzales*, 427 F.3d 1218, 1222 (9th Cir. 2005).

²²⁶ *See, e.g., Francois v. Gonzales*, 448 F.3d 645, 648 (3d Cir. 2006) (holding that the jurisdiction of a circuit court is limited to “pure questions of law”).

²²⁷ OFFICE OF THE U.N. HIGH COMM’R FOR REFUGEES (UNHCR), *HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS* ¶ 196 (1992).

²²⁸ *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427–28 (1999).

²²⁹ *Lin v. Dep’t of Justice*, 473 F.3d 48, 52 (2d Cir. 2007) (denying a petitioner’s motion to remand his case to the BIA to consider previously unavailable evidence suggesting that he may face forcible sterilization if returned to the Fujian Province in China). The relevant statute provides that

[i]f a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that (1) the additional evidence is material; and (2) there were reasonable grounds for failure to adduce the evidence before the agency; the court *may* order the additional evidence and any counterevidence the opposite party

generally remand a case to a BIA to apply a different legal standard,²³⁰ or if the agency has not made a determination as to a claim that would be necessary to the outcome of the case.²³¹

Since new country conditions may have an impact on whether a deportable alien would face a fear of persecution if returned to his country of origin, appellate courts should be required to remand to an IJ to consider previously unavailable evidence.²³² Remanding for additional fact finding is necessary because judicial review of a final order of deportation is restricted to the administrative record.²³³ Furthermore, under the Immigration and Nationality Act, a “court may review a final order of removal only if—the alien has exhausted all administrative remedies . . . as of right.”²³⁴ Certain appellate courts, however, have taken judicial notice of facts outside the record, especially regarding country conditions.²³⁵

desires to offer to be taken by the agency. The agency *may* modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order. . . .

28 U.S.C. § 2347(c) (2000) (emphasis added). However, the Fifth Circuit has held that under 8 U.S.C. § 1252(a)(1), an appellate court does not have authority to remand for consideration of additional evidence. *Lin v. Gonzales*, 150 F. App’x 326, 327 (5th Cir. 2005).

²³⁰ See, e.g., *Tran v. Gonzales*, 447 F.3d 937, 944 (6th Cir. 2006) (remanding to the BIA to consider a CAT claim under the correct standard of review); *Amir v. Gonzales*, 467 F.3d 921, 922–23 (6th Cir. 2006) (remanding to the agency because the IJ used wrong standard of proof in a CAT claim); *Bushira v. Gonzales*, 442 F.3d 626, 633 (8th Cir. 2006) (citation omitted) (noting that when the BIA applies an incorrect legal standard, remand is necessary).

²³¹ See, e.g., *Jordan v. Gonzales*, 204 F. App’x 425, 428–29 (5th Cir. 2006); *Bailon v. Gonzales*, 158 F. App’x 36, 38–39 (9th Cir. 2005).

²³² This is especially important in CAT claims where a court is obligated to consider all relevant evidence pertaining to the possibility of future torture, including “(1) [e]vidence of past torture inflicted upon the applicant; (2) [e]vidence that the applicant could relocate to a part of the country . . . where he or she is not likely to be tortured; (3) [e]vidence of gross . . . violations of human rights . . . ; and (4) [o]ther relevant information.” 8 C.F.R. § 208.16(c)(3) (2006).

²³³ 8 U.S.C. § 1252(b)(4)(A) (2000) (“[T]he court of appeals shall decide the petition [for review] only on the administrative record on which the order of removal is based.”).

²³⁴ 8 U.S.C. § 1252(d)(1) (2000). The failure to raise an issue before the BIA constitutes a failure to exhaust remedies with respect to that question and deprives a court of jurisdiction to hear the issue. See *Awad v. Ashcroft*, 328 F.3d 336, 340 (7th Cir. 2003) (holding that the exhaustion requirement operates as a jurisdictional bar and declining to address an argument the alien did not raise before the BIA).

²³⁵ See, e.g., *Hoxhallari v. Gonzales*, 468 F.3d 179, 186 n.5 (2d Cir. 2005) (“[W]e may always exercise independent discretion to take judicial notice of any further changes

It has been noted that permitting appellate courts to take judicial notice of new country conditions that are absent from the administrative record has the potential for “wholesale relitigation of many immigration-law claims, but the Courts of Appeals are ill-equipped to receive supplementary evidence.”²³⁶ Thus, rather than taking judicial notice of facts outside the administrative record, the Third Circuit has suggested that Congress “could require the Courts of Appeals, in their sound discretion, on motion or *sua sponte*, to grant petitions for review of the BIA, and remand when it appears from judicially-noticeable materials that the record compiled before the agency does not generally reflect contemporary country conditions.”²³⁷ Remand is important because even when petitioners do raise a claim that an IJ employed an erroneous legal standard, appellate courts have often rejected it.²³⁸

in a country’s politics that occurred between the time of the BIA’s determination decision and our review.”); *Latifi v. Gonzales*, 430 F.3d 103, 106 n.1 (2d Cir. 2005) (taking judicial notice of the fact that the Democratic Party returned to power in Albania). *Cf. Kamara v. Attorney General* 420 F.3d 202, 218 (3d Cir. 2005) (holding that it is precluded from taking notice of new country conditions and must make a decision based on a closed record in deciding whether to grant a petition for review); *Berishaj v. Ashcroft*, 378 F.3d 314, 329 (3d Cir. 2004) (holding that taking judicial notice of facts outside the administrative record violates the administrative law principles of *SEC v. Chenery Corp.*, 318 U.S. 80 (1943), that a court reviewing an agency decision must approve or reject that agency action purely on the basis of the reasons offered by the record compiled before the agency).

²³⁶ *Berishaj*, 378 F.3d at 330.

²³⁷ *Id.* The court found that the statute, 8 U.S.C. § 1229a(c)(6), which permits aliens to move to reopen proceedings on the basis of “new facts,” and regulation, 8 C.F.R. § 1003.2, which permits an alien or the government to move the BIA to reopen proceedings, and authorizing the BIA to do so *sua sponte*, permit reopening of asylum proceedings “based on changed country conditions arising in the country of nationality or the country to which removal has been ordered. . . . [W]e encourage the Department of Justice to adopt a policy that encourages its attorneys to file motions to reopen when the adjudication of an applicant’s claim would benefit from an updated administrative record.” *Id.* at 330–31. This, however, is not sufficient to remedy the problem of newly acquired evidence that may have a bearing on whether a deportable alien is likely to face persecution. The BIA has broad discretion on whether to grant motions to reopen, and appellate courts often do not overrule a BIA’s denial of a motion to reopen a case. *See, e.g., Panjwani v. Gonzales*, 401 F.3d 626, 631 (5th Cir. 2005); *Fessehay v. Gonzales*, 414 F.3d 746, 751–52 (7th Cir. 2005) (“The Board’s authority to grant or deny a motion to reopen is discretionary; we therefore review deferentially its decision for abuse of discretion. Motions to reopen are comparable to motions for rehearing or for a new trial, and thus are ‘strongly disfavored.’”) (citing *Selimi v. Ashcroft*, 360 F.3d 736, 739 (7th Cir. 2004)).

²³⁸ *See, e.g., Avendano-Espejo v. DHS*, 448 F.3d 503, 505–06 (2d Cir. 2006) (holding that the petitioner’s claim that an IJ employed an erroneous legal standard in

V. CONCLUSION

The REAL ID Act was enacted in part because, following the *St. Cyr* decision, federal courts were unclear on which immigration issues were judicially reviewable.²³⁹ As this Note has demonstrated, the REAL ID Act has failed to provide clarity with respect to the types of removal claims over which federal courts have proper jurisdiction. A lack of clarity at the appellate court level is problematic, some argue, because divergent circuit court decisions will compel aliens to “forum shop” for favorable courts.²⁴⁰

When the REAL ID Act was passed, the Joint Conference Report explained that “[n]o alien, not even criminal aliens, will be deprived of judicial review of such claims [and the act] would give every alien one day in the court of appeals, satisfying constitutional concerns”; the Report also claimed the Act would provide every alien a fair opportunity to obtain judicial review.²⁴¹ Rather than providing every alien with a fair opportunity for judicial review, the REAL ID Act has had the effect of restricting the scope of judicial review over final orders of removal. This is at odds with the “strong presumption in favor of judicial review of administrative action.”²⁴² Under the Fifth Amendment’s Due Process Clause, aliens subject to removal are afforded a “full and fair hearing”²⁴³ and the opportunity to present evidence on their behalf.²⁴⁴

adjudicating his request for relief, thereby depriving him of his due process right to a full and fair hearing, amounted to a challenge to the IJ’s exercise of his discretion; “petitioner’s attempt to ‘dress up’ his challenge with the language of ‘due process’ is insufficient to provide our Court with jurisdiction to review his claim”); *Saloum v. U.S. Citizenship & Immigration Servs.*, 437 F.3d 238, 243 (2d Cir. 2006) (“[T]he mere assertion . . . that the IJ had failed to apply the law and thereby committed legal error or otherwise abused his discretion, did not itself establish a question of law over which we had jurisdiction under the REAL ID Act.”); *Torres-Aguilar v. INS*, 246 F.3d 1267, 1270–71 (9th Cir. 2001) (denying a petition to review a claim that the IJ denied him a fair and impartial hearing on grounds that while it has jurisdiction to review a due process challenge, the petitioner cloaked an abuse of discretion claim in “constitutional garb”) (citation omitted).

²³⁹ See H.R. REP. 109-72, at 173–74 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 299 (noting that the *St. Cyr* holding resulted in “piecemeal review, uncertainty, lack of uniformity”).

²⁴⁰ See Swarns, *supra* note 17, at A11.

²⁴¹ H.R. REP. 109-72, at 174–75 (2005), as reprinted in 2005 U.S.C.C.A.N. 240, 299.

²⁴² *INS v. St. Cyr*, 533 U.S. 289, 298 (2001) (citation omitted).

²⁴³ *Alvarez-Santos v. INS*, 332 F.3d 1245, 1252 (9th Cir. 2003).

²⁴⁴ See *Abdulai v. Ashcroft*, 239 F.3d 542, 549 (3d Cir. 2001) (finding that aliens in removal proceedings should have a meaningful opportunity to present their claims).

As this Note has demonstrated, a number of deportable aliens seeking relief from removal are being denied a proper evidentiary hearing before an immigration judge. This is especially problematic in the context of claims for asylum and protection under CAT where proof of the persecution is crucial and newly acquired evidence can have a bearing on whether an alien meets their burden of proof. While reducing the high volume of immigration appeals in federal courts is a desirable goal, and deportable aliens should not be permitted to “shoehorn” any claim into the “question of law” category if it does not fit there,²⁴⁵ it is precisely in the area of discretionary and factual determinations that appellate courts have directed their criticisms of immigration judges and the BIA.²⁴⁶

In order to provide deportable aliens with fair removal proceedings that comport with procedural due process, appellate courts must engage in a more heightened review of immigration court decisions, or significant reforms need to be directed at immigration courts, the BIA, and the administrative review process. In the context of claims of asylum, CAT, and withholding of removal, where a deportable alien has a genuine fear of persecution, principles of due process should not be forsaken for judicial efficiency.

²⁴⁵ *Vasile v. Gonzales*, 417 F.3d 766, 768 (7th Cir. 2005).

²⁴⁶ *See, e.g., Vasha v. Gonzales*, 410 F.3d 863, 869 (6th Cir. 2005) (holding that an adverse credibility finding is afforded substantial deference, but noting that several of the inconsistencies identified by the IJ were unsupported by the record and based on “mere speculation”).